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IN THE 15 I.A.2d 48

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - SECOND DIVISION

~~FEBRUARY~~ May TERM, 1957.

CHARLES HOWES, Plaintiff-Appellant, vs. SADIE NATHAN, and ESTHER P. FETTERS, Defendants-Appellees.	Appeal from Circuit Court Winnebago County.

CROW, J.

The plaintiff, Charles Howes, filed a complaint consisting of two counts, Count I being a claim under the Dram Shop Act for damages for personal injuries against the defendant Sadie Nathan alleging that she, by her agent, sold alcoholic liquor to one Esther P. Fetters, which caused her intoxication, in whole or in part; that Esther P. Fetters, so being intoxicated, and in consequence of such intoxication, on March 12, 1955 made an assault upon the plaintiff and hit him a violent blow in the face with a beer glass. He alleged permanent injuries and claimed damages in the sum of $15,000.00. Count II charged the defendant Esther P. Fetters with a wilful assault and battery the same date and sought damages in the same amount. A trial by jury was had. The jury in separate verdicts found each

CLARKE [illegible]

[illegible]

[illegible]

SAMUEL A. [illegible]
I. [illegible]

[illegible]

BROWN, J. [illegible]

[illegible] sistin[illegible] Shop. [illegible] Sadie [illegible] liquor [illegible] in whol[illegible] ted, a[illegible] made [illegible] in the ice with a [illegible] claimed damages in the [illegible] defendant Barker P. [illegible] the complaint and sought damages in the [illegible] by jury was had. The jury [illegible]

defendant not guilty. The plaintiff's post trial motion for a new trial was denied. From the judgment for the defendants, entered upon the verdicts, the plaintiff appeals.

The plaintiff-appellant's theory of the case is that he was denied a fair trial by an impartial jury; the Court erred in the admission and exclusion of certain evidence; the Court erred in refusing to give a proper instruction tendered by the plaintiff; the Court erred in giving certain improper instructions tendered by the defendants; and the verdicts, special finding of fact, and judgment are against the manifest weight of the evidence.

Three witnesses testified for the plaintiff, namely, Frank Lancaster, William Wolosek, and the plaintiff himself; on behalf of the defendants, five witnesses testified, namely, Sadie Nathan, a defendant, Esther P. Fetters, a defendant, Ralph Jewell, Marie Kelly, and Thomas McDonnell.

The following special interrogatory was submitted at the request of the plaintiff, and the jury's answer was "NO":

> "Do you find from the preponderance or greater weight of the evidence that the defendant, Esther P. Fetters, committed a wilful and wanton assault and battery upon the plaintiff, Charles Howes, and that malice is the gist of the action?"

Since one of the contentions of the plaintiff is that the special finding of fact, verdicts, and judgment are against the manifest weight of the evidence, it is necessary that we review the evidence. The evidence for the plaintiff, so far as material, is substantially as follows:

defendant [illegible]

new trial [illegible]

entered [illegible]

[illegible]

he was [illegible]

erred [illegible]

Court erred [illegible]

by the [illegible]

instruct [illegible]

special [illegible]

weight [illegible]

[illegible]

Frank Lancaster, [illegible]

on behalf [illegible]

Sadie [illegible]

Ralph Dowell. [illegible]

[illegible]

at the request of the plaintiff. [illegible]

"NO":

> "[illegible]
> [illegible] of the [illegible]
> [illegible] letters, [illegible]
> [illegible] assault and battery [illegible]
> [illegible] lower, and that [illegible]
> [illegible] the action?"

[illegible] one of the [illegible]

the special finding of fact, [illegible]

the manifest weight of the evidence, [illegible]

view the evidence. The evidence [illegible]

material, is substantially as follows:

The plaintiff, 56 years of age, lived, on March 12, 1955, at the Salvation Army Men's Social Center, Rockford, and about 7:00 p.m. that day he went to Sadie Nathan's Tavern in Rockford to get a drink. Two friends accompanied him to the tavern, but went next door to eat. He had left his place of residence about 4:30 p.m. and had had a couple of drinks elsewhere before he arrived at the defendant Nathan's tavern. He apparently first asked for a glass of wine and was refused because of his intoxicated condition, according to a bartender, although the plaintiff says he was not refused by anyone. He says he ordered a glass of beer there and was sitting on a stool drinking it; when he started to get off or backed off the stool, he tripped on his long overcoat, and accidentally bumped into the back of the defendant Esther P. Fetters. He had not seen Mrs. Fetters before he was struck. The plaintiff testified that he guesses Mrs. Fetters must have swung around and struck him in the face with a beer glass, producing a cut 2 3/4 inches long on the right side of his face. He said he was not drunk at the time, but he was drinking. He was taken to the hospital and then to the jail. It took about 4 weeks for his face to heal, leaving a large scar.

Frank Lancaster was acquainted with the plaintiff, had worked with him at the Salvation Army, and was in the defendant Sadie Nathan's Rockford Tap that evening. About 1/2 hour after he got there he saw Mrs. Fetters and a couple come in. He saw Mrs. Fetters go up and get a glass of beer, come back toward the shuffleboard to a couple she was with, and talk with them. He saw the plaintiff, who was sitting at the bar, get off a stool,

The plaintiff, [illegible] years of age, [illegible] on June [illegible], 1955, as the Salvation Army [illegible] in Brutal [illegible] worked, [illegible] about 7:00 p.m. that day he [illegible] Rockford [illegible] tavern, but [illegible] residence about 1:30 p.m. and he [illegible] couple of [illegible] where before he arrived [illegible] apparently first asked for a place [illegible] cause of his unkempt condition, [illegible] although the plaintiff says he was [illegible] says he ordered a glass of [illegible] drinking it, when [illegible] he tripped on his long overcoat, [illegible] the back of the defendant [illegible] Mrs. Fetters before he was struck. [illegible] he guesses Mrs. Fetters must have [illegible] in the face with a beer glass, producing [illegible] on the right side of his face. He said he [illegible] time, but he was drinking. He was taken to the hospital and then to the jail. It took about 4 weeks for his face to heal, leaving a large scar.

Frank Lancaster was acquainted with the plaintiff, has worked with him at the Salvation Army, and was in the tavern Sadie Hathan's Rockford Tap that evening. About 1/2 hour after he got there he saw Mrs. Fetters and a couple come in. He saw Mrs. Fetters go up and get a glass of beer, then look toward the shuffleboard to a couple she was with, and talk with them. He saw the plaintiff, who was sitting at the bar, get off a stool,

get tangled in his overcoat, fall backwards, and, as he fell, he backed, bumped, or fell into Mrs. Fetters. They contacted back to back, and she swung around and hit the plaintiff in the face with a beer glass. The plaintiff and Mrs. Fetters had no conversation before that. He was of the opinion that Mrs. Fetters was intoxicated, and gave, as his reason, that when a woman is talkative, she is intoxicated. He said that the plaintiff Howes had been drinking and was intoxicated also. The bar was on the west side and the shuffleboard on the east side of the room, about 10 feet apart.

William Wolosek was acquainted with the plaintiff and Sadie Nathan, and was in the Rockford Tap at the time. The plaintiff was at the bar, drinking a glass of beer. Mrs. Fetters swung around, took a glass, and hit the plaintiff right in the head, and knocked him down. There was beer in the glass. He doesn't know whether Mrs. Fetters was sober or intoxicated, but he saw her drink alcoholic liquor.

The defendants' testimony, so far as material, is substantially as follows: Esther P. Fetters went to the Rockford Tap about 7:30 p.m. and she had a friend with her, Marie Kelly. They had each had a glass of beer at another place before coming there. After they entered the Rockford Tap both had a beer there, - her brother being in the tavern with them at the time. He bought three beers, gave her one, Mrs. Kelly one, and drank one himself. They were near the shuffleboard. She was standing there, holding her beer, had consumed about one-half of it, when someone came over and hit her hand, or back, or something, and beer went all over her face. That person

[illegible] tangled in [illegible] overcoat, [illegible] [illegible], [illegible] [illegible], [illegible] be booked, [illegible], or full into [illegible]. [illegible] back to back, and [illegible] [illegible] face with a [illegible] place. [illegible] [illegible] no conversation [illegible] [illegible]. Fetters [illegible] [illegible], [illegible] [illegible] a woman is [illegible], [illegible] [illegible] plaintiff [illegible] [illegible] [illegible]. The bar was on the [illegible] side of the room, about 10 [illegible] [illegible] side of it.

William [illegible] was [illegible] [illegible] Sadie Watson, [illegible] [illegible] the [illegible]. The plaintiff was [illegible] [illegible], drinking a glass [illegible]. Fetters [illegible] [illegible] [illegible] a glass, [illegible] [illegible] right in the [illegible], and [illegible] [illegible] [illegible] the glass. He doesn't know [illegible] [illegible] [illegible] intoxicated, but he saw her drink alcoholic liquor.

The defendant testified, so far as [illegible], substantially as follows: Between 6 [illegible] [illegible] [illegible] Tap about 7:30 p.m. and saw had a friend with him, [illegible]. They had each [illegible] [illegible] [illegible] [illegible] [illegible] ing there. After they entered the [illegible] [illegible] beer there, - her brother [illegible] in the saloon with him at the time. He bought three beers, gave her one, he [illegible] one, and drank one himself. They were near the [illegible]. She was standing there, holding her beer, [illegible] [illegible] half of it, when someone came over and hit her [illegible], or hook, or something, and beer went all over her face. [illegible] person

fell on the floor and her glass fell on the floor out of her hand, and broke. After the glass fell, the man, if it was a man, was lying on the floor. She didn't have any conversation with the man, but he did say some kind of a dirty name. She imagines she had the glass in her right hand. She didn't hit the plaintiff. She did not know the man and did not recognize the plaintiff in the court room.

Marie Kelly testified she had one glass of beer. She was at the shuffleboard, across from the bar, and was watching television at the time. She happened to hear Mrs. Fetters say to Howes: "Don't call me names." She turned around, this man was standing beside Mrs. Fetters, with his hand raised, and the next thing she and Mrs. Fetters had beer on their clothes. She did not recognize the plaintiff as the man involved. She didn't see Mrs. Fetters strike a man with her beer glass or see anyone hit anyone. She was with Mrs. Fetters and her brother. They stood by the shuffleboard. The brother had gone to the bar and ordered three glasses of beer. They each had a glass, but had not consumed it. She did not believe Mrs. Fetters was drunk and Mrs. Fetters did not seem intoxicated to her.

Thomas McDonnell testified that he was a bartender employed by Sadie Nathan. He saw the plaintiff in the tavern, and the plaintiff ordered a glass of wine from him. He observed the plaintiff's speech, that the plaintiff was apparently intoxicated, that he was standing at the bar swaying. McDonnell refused him and told him to get away from the bar. When he first saw Esther Fetters she was standing on the east

fell on the floor and her [illegible]
hand, and broke. [illegible]
man, was [illegible]
with the [illegible]
imagined [illegible]
the plaintiff. [illegible]
the plaintiff [illegible]

[illegible]
was at the shuffleboard, playing [illegible]
television at the time. She [illegible]
say to Bowser "Don't call my mamma." [illegible]
man was standing [illegible] Fetters, [illegible]
the next thing [illegible]
She did not recognize the plaintiff [illegible]
She didn't see him. [illegible]
or see anyone [illegible]
brother. They [illegible] by the shuffleboard. [illegible]
to the bar and ordered three glasses [illegible]
glass, but had not consumed it. She [illegible]
Fetters was drunk and fire. Fetters [illegible]
her.

Thomas McDonnell testified that he was a bartender
employed by Radio Station [illegible] he saw the plaintiff in the tavern,
and the plaintiff ordered a glass of [illegible] from him. [illegible]
served the plaintiff's spouse, that the plaintiff was [illegible]
ly intoxicated, that he was standing at the bar [illegible].
McDonnell refused him and told him to go away from the bar.
When he first saw Fetters Fetters was standing on the beat

side of the room against the shuffle alley and there were people near her, but whether they were with her he did not know. Mrs. Fetters was standing approximately behind the plaintiff Howes. It was 8 to 10 feet to the shuffle alley from the bar. McDonnell went back to work, and the next time he noticed Howes, he happened to look up, and saw Howes stumble, apparently stumble into Mrs. Fetters. She was holding a glass of beer in her hand and it spilled on her hand and clothes. He overheard no conversation between Howes and Mrs. Fetters. Ralph Jewell was there also tending bar. His hours were from 3:00 in the afternoon until closing time. The bar is about 45 feet long, the stools extend completely around the bar, and there were 60 or 70 people there at the time. There were people standing in groups behind other people, and there were people across against the wall. McDonnell didn't serve Mrs. Fetters beer or any alcoholic liquor and did not know who did. He did not notice anything unusual about her and would say she was sober.

Ralph Jewell, another bartender, was also employed at the Rockford Tap. He was acquainted with the plaintiff Howes and saw him there the evening of March 12, 1955. The only time he saw the plaintiff was when Howes was over by the shuffle board. He had blood on his head, a little trickly of blood. He was standing up.

Sadie Nathan, one of the defendants, testified substantially as follows: She operated the tavern, the Rockford Tap. She saw the plaintiff Charles Howes as he entered the back door. It was about 7:00 or 7:30. As he came in he was stagger-

side of the room and an the shuffle alley and there were people over her, but whether they were with her he did not know. Mrs. Watkins was standing a [illegible] behind the plaintiff's [illegible]. [illegible] was a [illegible] feet [illegible] from the bar. [illegible] went back to work, and the last time he noticed Moves, he happened to look up, [illegible] apparently stumble into the [illegible]. [illegible] a glass of beer in her hand and it spilled on [illegible]. He overheard no conversation between Moves and [illegible]. Ralph Jewell was there also tending bar. [illegible] 3:00 in the afternoon until closing time. The bar is about 45 feet long, the alcove extend [illegible] there were 60 or 70 people there at the time. [illegible] standing in groups behind other people, and [illegible] across against the wall. [illegible] beer or any alcoholic liquor and did not [illegible] not notice anything unusual about her [illegible] sober.

Ralph Jewell, another bartender, was [illegible] the Rockford Tap. He was acquainted with the plaintiff [illegible] and saw him there the evening of March 12, 1[illegible]. He saw the plaintiff when Moves was [illegible] board. He had blood on his head, a little trickly or [illegible]. He was standing up.

Sadie Watkins, one of the defendants, testified substantially as follows: She operated the tavern, the Rockford Tap. She saw the plaintiff Charles Moves as he entered the back door. It was about 7:00 or 7:30. As he came in he was stagger-

ing. As he approached the bar she motioned to Tom not to serve him - he had had enough to drink. She saw Tom turn him down. She got a package customer and went to take care of that business. Howes was not served anything in her place of business to her knowledge. She is acquainted with Mrs. Fetters as a customer. Mrs. Fetters was in the place that evening. The place was crowded. She didn't see anything occur between Mrs. Fetters and the plaintiff. She heard a crash, and then went to the place where they were standing. She saw Howes, the plaintiff, lying on the floor, on top of a broken beer glass. She did not know how it was broken but it was a broken glass. Howes was right below Mrs. Fetters, and was conscious as far as she knew. Mrs. Fetters and she were standing right over him. She asked Mrs. Fetters what had happened and Mrs. Fetters said the man bumped into her, knocking a glass out of her hand, and as he bumped into her he fell down. She got a cold towel and washed Howes' face, and stayed with him until the police came.

It is very apparent that the evidence is conflicting as to what occurred, as to how the plaintiff received his injury, whether the defendant Esther Fetters struck him in the face with a beer glass, whether the plaintiff accidentally fell to the floor and struck his face on a broken glass on the floor, whether Esther Fetters was, in fact, an intoxicated person, whether, if so, she was intoxicated, in whole or in part, by any alcoholic liquor given or sold her in Sadie Nathan's tavern, and whether the plaintiff was injured by an intoxicated person or in consequence of the intoxication of any person. We think those issues were questions of fact and that they, together with

ing. As he approached the door she [illegible] to be a nerve
bin - he had had enough to drink. [illegible]
She got a package cigarettes and went to [illegible] the
house. Howes was not served anything [illegible] place of business
to her knowledge. She [illegible] Howes. Fetters as a
customer. Mrs. Fetters was in the [illegible]. The
place was crowded. [illegible] a fighting [illegible] Mrs.
Fetters and the plaintiff. She heard [illegible] noise
to the place where they were standing. [illegible] the
plaintiff, lying on the floor, or [illegible]
She did not know how it was broken, but it was a broken glass.
Howes was right behind Mrs. Fetters, and [illegible]
as she knew. Mrs. Fetters and she [illegible]
bin. She asked Mrs. Fetters what he [illegible]
said the man hanged into her, knocking a [illegible]
and as he bounced into her he fell down. [illegible]
and washed Howes' face, and stayed with him until [illegible]
came.

It is very apparent that the evidence [illegible]
as to what occurred, as to how the plaintiff received the injury,
whether the defendant Esther Fetters struck him [illegible]
with a beer glass, whether the plaintiff actually fell [illegible]
the floor and struck his face on a broken glass on the floor,
whether Esther Fetters was, in fact, an intoxicated person,
whether, if so, she was intoxicated, in whole or in part, by
alcoholic liquor given or sold her in Santa Anita's tavern,
and whether the plaintiff was injured by an intoxicated person
or in consequence of the intoxication of any person. We think
those issues were questions of fact and that they, together with

the necessary determination of the credibility of the witnesses and the drawing of reasonable inferences of fact from the evidence, were preeminently matters for the jury to decide. There is competent evidence to support the verdicts, and they are not, in our opinion, contrary to the manifest weight of the evidence. In an assault and battery case, where the evidence is conflicting, it is a question for the jury to say whether the allegations of the complaint were proven by a preponderance of the evidence: RIDGWAY v. CRUM (1951) 343 Ill. App. 12. Where lies the greater weight or preponderance of the evidence, - which witnesses are to be believed, - what reasonable inferences of fact are to be drawn from the proof, - were for the jury to decide, not the trial court, or us. The trial court having permitted the verdicts to stand upon a full consideration and review on the plaintiff's post trial motion for a new trial, we are not now disposed to disturb them.

The Court in MATKINS vs. FENORSKY et al. (1952) 348 Ill. App. 125, said:

> "The question of the intoxication of a person involved in a Dram Shop Act proceeding is ordinarily a question of fact for the jury, if there is evidence on the subject, and it is the peculiar province of the jury to decide from all the evidence where the truth lay."

And the question of whether a tavern patron's intoxication is the proximate cause of an injury to the plaintiff where the plaintiff claims, and to the extent he claims, an injury "in consequence of the intoxication" of such person is normally to be determined by the jury from all the evidence and attending circumstances: CASEY v. BURNS (1955) 7 Ill. App. (2d) 316.

the [illegible]

and the [illegible]

dence, [illegible]

is conjecture [illegible]

in our opinion, [illegible]

In an [illegible]

it is a question [illegible]

the complaints were proven by a [illegible]

RIDGWAY v. [illegible] ([illegible]) [illegible]

or weight or preponderance of the [illegible],

are to be believed, - [illegible]

be drawn from the proof, - [illegible]

trial court, or [illegible]

dicta to stand [illegible]

tiff's post trial [illegible]

posed to [illegible]

The [illegible]

App. 125, said:

> "The question of [illegible]
> son involved [illegible]
> is ordinarily a question [illegible]
> [illegible], if there is evidence [illegible]
> and it is the peculiar province [illegible]
> jury to decide from all the [illegible]
> the truth [illegible]."

And the question of whether a [illegible]

tion is the proximate cause of an [illegible]

the plaintiff claims, and to the extent [illegible]

"in consequence of the intervening [illegible]

to be determined by the [illegible]

circumstances. [illegible] ([illegible]) [illegible] App. (1st) 31.

The plaintiff complains of the ruling of the trial court in refusing plaintiff's instruction No. 1, which was as follows:

> "The court instructs the jury that there was in full force and effect on March 12, 1955, a certain statute which provided, in part, as follows:
>
> 'Every husband, wife, child, parent, guardian, employer or other person, who shall be injured, in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such person.' "

We believe this instruction, under the circumstances, was improper, might well have had a tendency to mislead the jury, and there was no error in refusing it, for the reason that it does not refer to the instant case, or the evidence, and is not made applicable to the facts in evidence. It does not require proof of facts bringing the statute into operation and creating a liability, and it is abstract in character; the construction and interpretation of a statute is for the Court and should not be left to the jury: JACKSON v. HURSEY et al. (1954) 1 Ill. App. (2) 598; BURKE v. ZWICK (1939) 299 Ill. App. 558; GARVEY v. CHGO. RYS. CO. (1930) 339 Ill. 276; CONFREY vs. STARK (1874) 73 Ill. 187. In BAKER etc. v. SUMMERS (1903) 201 Ill. 52, a substantially similar instruction stating the liability created by the Dram Shop Act, and the right of action given, in the words of the statute, but containing no other reference to the case, no reference to the evidence, and not requiring proof of facts which would create a liability, was held to be an abstract proposition

of law and reversible error. The plaintiff cites: COX vs. HRASKY et al. (1943) 318 Ill. App. 287; REGAN v. KEATING et al. (1941) 315 Ill. App. 130; and HEFFERNAN et al. v. BAIL (1902) 109 Ill. App. 231. In the first case, the instruction in question is not set out in the opinion, but is described as being in the language of the statute, not referring to the evidence, and not requiring proof of any fact that would create liability. The opinion indicates the Court felt it erroneous in itself but that considering all the instructions as a series it was cured by other instructions. The second case is published in abstract form and nothing in this regard can be determined from the abstract. In the third case the instruction in question is not set out in the opinion and nothing can be determined therefrom.

The plaintiff also claims error in the giving of the defendant Sadie Nathan's instructions Nos. 3, 9, and 10. Instruction No. 3, relates to the issues presented by the pleadings. It read:

> "The court instructs the jury that in this case the plaintiff, Charles Howes, has filed a complaint in two parts or counts against the defendants, Sadie Nathan and Esther P. Fetters.
>
> "By Count I it is alleged in substance that on the date in question the defendant, Sadie Nathan, operated the Rockford Tap in Rockford, Illinois, where alcoholic liquor was sold at retail, and that on March 12, 1955 said defendant, or her agents and servants, sold or gave alcoholic liquor to Esther P. Fetters which caused her intoxication, in whole or in part, and that while so intoxicated the said Esther P. Fetters made an assault upon the plaintiff causing injuries for which plaintiff asks damages against the defendant, Sadie Nathan.

of [illegible]

[illegible] et al. ([illegible]) [illegible]

(1941) [illegible]

109 Ill. App. 2d [illegible]

tion is not [illegible]

in the [illegible]

and not requiring [illegible]

The quotation [illegible]

that [illegible]

by other [illegible]

form and [illegible]

street. [illegible]

set out in [illegible]

The [illegible]

defendant [illegible]

structure [illegible]

hope. [illegible]

"The [illegible] the [illegible]
was the [illegible] which [illegible]
filled a [illegible] in two [illegible]
[illegible] the [illegible]
rather [illegible] fixtures.

"The court [illegible] is alleged [illegible]
on the [illegible] in question [illegible]
[illegible], operated the [illegible]
Illinois, where [illegible]
retail, and that on March 12, [illegible]
[illegible], or had [illegible]
have alcoholic liquor to [illegible]
which caused her [illegible]
in part, and that while [illegible]
said [illegible] 1. [illegible]
the plaintiff [illegible]
plaintiff does [illegible]
[illegible] .

"By Count II of said complaint it is alleged in substance that on March 12, 1955 the defendant, Esther P. Fetters, assaulted the plaintiff causing injuries to him for which he asks damages.

"The defendant, Sadie Nathan, has filed her answer to Count I of said complaint in substance admitting operation of the Rockford Tap, but denying the other allegations thereof.

"It is upon the aforesaid complaint filed by the plaintiff, and the answers thereto filed by the defendants, and the issues formed thereby that this cause comes before the court and jury for determination."

We think it is proper by an instruction such as that for the Court in a clear and concise manner to define for the jury, briefly, the issues raised by the pleadings, in summary, succinct, non-repetitious form, if such is accurate, and we perceive no, and are referred to no, substantial inaccuracy in the instruction here; it does not attempt a lengthy embodiment of the pleadings: SIGNA v. ALLURI et al. (1953) 351 Ill. App. 11. The parties are entitled to have the jury instructed briefly on the issues presented by the pleadings that are for their determination: FRAIDER etc. et al. vs. HANNAH etc. et al. (1949) 338 Ill. App. 440. That the instruction uses the words "assault" and "assaulted" but does not specifically also use the word "battery" or "hit" seems to us hypercritical, and does not demonstrate any prejudice to the plaintiff.

Instruction No. 9 was as follows:

"The court instructs the jury that under the Dram Shop Law in order to find the defendant guilty the plaintiff must prove by the preponderance of the evidence, among other things, that the said Esther P. Fetters was in fact intoxicated at the time of the occurrence in question, in whole or in part, by liquor sold, or given to her by the defendant, Sadie Nathan, or her agents and servants. It is not enough for the plaintiff to prove part intoxication on the part of Esther P. Fetters."

[illegible]

"The defendant, [illegible], was [illegible] to answer to about [illegible] of said [illegible] advertising [illegible] "[illegible]" [illegible] denying the other allegations [illegible].

"It is [illegible] that [illegible] the plaintiff [illegible] the defendants, [illegible] [illegible] and [illegible] [illegible].

We think [illegible] because [illegible] briefly, the [illegible] [illegible] succinct, [illegible] [illegible] [illegible] instruction [illegible] the plaintiff [illegible] The parties are entitled to [illegible] the issues presented by the [illegible] termination: [illegible] 338 III. App. 442. "Not the [illegible] and "assaulted" [illegible] "battery" or "like" [illegible] constitute any [illegible] in the [illegible].

Instruction No. 9 was as follows:

"The court instructs the [illegible] [illegible] drop [illegible] in order to [illegible] the defendant [illegible] the plaintiff [illegible] [illegible] [illegible] evidence, among other things, that the said Esther [illegible] intoxicated at the time of the occurrence in question, in whole or in part, by liquor [illegible] or given to her by the defendants, Ruth Bathen or her agents and servant. [illegible] for the plaintiff to [illegible] [illegible] on the part of Esther [illegible]."

The plaintiff refers us to no authority to the effect such instruction is erroneous. It is not part of our duty to search for error or enter upon an independent investigation to try to find material upon which to base a reversal: PEOPLE v. FOSTER et al. (1919) 288 Ill. 371. We believe, however, that the proposition of law stated therein is substantially supported by SHORB vs. WEBBER (1900) 188 Ill. 126; it is not necessary by an instruction to attempt to define "intoxicated"; the word "liquor" as used therein necessarily means "alcoholic liquor" under the circumstances; and the jury cannot have been misled. Other instructions were given relative to the Dram Shop Law but if they had not been the plaintiff cannot complain that the Court has not given an instruction containing a correct statement of the law and applying it to the facts in evidence unless a proper instruction has been prepared and rendered by the plaintiff for that purpose: STIVERS v. BLACK AND CO. (1942) 315 Ill. App. 38.

Instruction No. 10 related to the propositions to be proved. The plaintiff again cites us to no authority to the effect that this instruction is erroneous, and we will not search for error; we believe there was no reversible error in giving it; that it used "intoxicating liquor" instead of "alcoholic liquor", and that it did not attempt to define "intoxicated", "intoxication", or "intoxicating liquor" are not defects, or defects of substance, and cannot, under the circumstances, have misled the jury. We know of no terms which could safely be incorporated in an instruction defining "intoxication" or the other similar words: SHORB v. WEBBER, supra. The use of "assault" and "assaulted" therein seems reasonably clear under the circumstances and not prejudicial to the plaintiff.

The plaintiff also claims error in the giving of defendant Esther Fetter's instruction Nos. 1, 2, and 6. Instruction No. 1 related to the propositions to be proved. The plaintiff's only objection to that instruction is that it required him to prove he was in the Rockford Tap March 12, 1955. This factual matter was, in effect, put in issue by the allegations of the pleadings, and we find no error in that respect in giving that instruction, under the circumstances. Again, we are referred to no authority by the plaintiff as to why that instruction was error, or prejudicial, reversible error, under the circumstances, and we will not search for error.

Instruction No. 2, as it appears in the abstract, is marked "WITHDRAWN", and requires no further consideration.

Instruction No. 6 was a rather standard instruction that the plaintiff is required to prove all the elements of his case by the greater weight of the evidence, etc. This instruction was approved in STIVERS vs. BLACK AND COMPANY, supra, and in LAURENT vs. RINEHART (1954) 2 Ill. App. (2d) 410, and in this or a substantially similar form is not at all unusual.

The plaintiff also makes a point of the Court's admission into evidence of the conversation of Esther Fetters to Sadie Nathan, as related by Sadie Nathan, that the man had bumped into her, knocking a glass out of her hand, and fallen down. The plaintiff urges this was hearsay. A reading of this testimony discloses that the conversation was in the actual presence of the plaintiff. The plaintiff was lying on the floor at the time, and Mrs. Fetters and Sadie Nathan were

immediately above him. Inasmuch as it does not appear that the plaintiff was unconscious, - he says he was not, - or incapable of testifying as to his own version thereof or the facts generally, which he in fact did, - we do not believe this testimony was incompetent.

In the course of the trial the plaintiff was asked on redirect examination to state the length of the scar on his right cheek. An objection of the defendants was sustained. The plaintiff claims this was prejudicial error, the testimony was material, and he was deprived of a fair opportunity to present his case. As the defendants point out, however, the plaintiff had previously in his direct examination already testified, without objection, "the cut I received is 2 3/4 inches long, I think," and that evidence was already before the jury. We believe that sustaining this particular objection to this other later question was harmless error, if error at all. The jury already had the full benefit of the evidence here claimed to have been erroneously excluded, and the plaintiff was not prejudiced: NATIONAL LOCK CO. v. ALDEEN (1933) 271 Ill. App. 37. The jury personally observed the plaintiff while he was testifying, could see the scar if it was visible, and apparently on both direct and redirect examination be gestured or pointed to the place on his face.

We find no substantial error, and no reversible error, and the judgment will, therefore, be affirmed.

A F F I R M E D .

Wright J
concurs

WRIGHT, J. CONCURS.

WRIGHT, J. CONCURS.

Do Not Publish.

Abstract

Case No. 11092 Agenda 12

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1957

DONALD C. ALLEKSWORTH, Plaintiff-Appellant, -vs- 1st GALESBURG NATIONAL BANK & TRUST COMPANY (a corporation), Defendant-Appellee.	15 I.A.2d 49 Appeal from the County Circuit Court.

CROW, J.

The plaintiff-appellant Donald C. Alleksworth filed a notice of appeal in this matter August 6, 1956. As we understand the notice of appeal, from examining the record, he seeks to appeal from: (1) the order of September 16, 1952 allowing the motion of First Galesburg National Bank and Trust Company, a defendant, to strike the complaint; (2) the order of December 16, 1952 denying the motion of the plaintiff to add certain additional parties defendant; (3) the order of February 6, 1956 denying the motion of the plaintiff for leave to file an amended complaint; (4) the order of February 24, 1956 denying the motion of the plaintiff to consolidate certain cases; (5) the order of April

12, 1956 denying the
testimony; and (6) the
motion of the plaintiff to
to file a petition to perpetua

Appeals lie to this Court, - so far
only to review final judgments, orders or decrees: CH.
REV. STATS., 1957, par. 77. None of the orders referred
the notice of appeal are final orders, and hence this appeal
does not lie.

Further, no appeal may be taken to this Court, - so
far as material, - after the expiration of 60 days from the
entry of the order complained of: CH. 110, ILL. REV. STATS.,
1957, par. 76. The notice of appeal of August 6, 1956, is
more than 60 days after the entry of any of the orders com-
plained of, and hence this appeal does not lie for that
reason also, even were any of the orders final in character.

On motion of the plaintiff, no objections being filed
by the defendants, we have heretofore dispensed with the
furnishing of an abstract, pursuant to our Rule 6: CH. 110,
ILL. REV. STATS., 1957, par. 201.6. Such was done upon the
necessarily implied assumption that the record and the plain-
tiff-appellant's brief would conform to our Rules and would
be sufficient and of such character as accurately and adequately
to present the case for our consideration.

The plaintiff's brief is four (4) pages in length. It
is divided into two parts, - Roman numeral I is called "Nature
of the Case", and Roman numeral II is called "Appellant's Theory
of the Case". Number I, Nature of the Case, reads, in full,
as follows:

"In this action plaintiff seeks leave of court to bring action of conspiracy against the 1st Galesburg National Bank & Trust Company (a corporation), respectfully complying with the Final Order in [illegible] (Ronald C. Allenworth, defendant), No. [illegible], April 27, 1944.

"That the Circuit Court did not have jurisdiction in the matter because of that Order. It is therefore necessary for plaintiff to obtain permission from this Court to proceed providing conspiracy is the challenge required. All of the dismissals and denials herein made by the Circuit Judge were proper, and the complaint and all other supporting pleadings and motions are herewith submitted to this Court."

Number II, appellant's Theory of the Case, occupies about two full pages, and is not a statement of any theory of the case but apparently a rather rambling account of alleged facts or allegations of some of the pleadings. The defendants-appellees have filed no brief here.

Our Rule 7, Briefs, CH. 110A, ILL. REV. STATS., 1957, PAR. 201.7, provides that the appellant's brief shall contain these divisions in this order: Nature of the Case, Points and Authorities, Statement of Facts, and Argument. The Nature of the Case is to contain, in this order, (1) the nature of the action, the judgment or decree appealed from, etc., (2) the pleadings, if material, etc., and (3) a brief statement outlining the appellant's theory of the case. The Points and Authorities division is to consist of the propositions relied upon in support of the appeal, with citation of authorities. The Statement of Facts and Argument divisions are also explicitly defined in the Rule.

The plaintiff-appellant's brief has no Points and Authorities division at all, - it states not a single proposition re-

lied upon in support of the appeal, and gives us not a single citation of any authority; it has no Statement of Facts division; it has no Argument division; its Nature of the Case division is inadequate because it does not contain the judgment or decree appealed from, the pleadings, or a brief statement outlining the appellant's theory of the case; and what is called Number II, Appellant's Theory of the Case, is not supposed to be a separate division but a part of the Nature of the Case, is out of order, and is not a statement of any theory of the case anyway.

The record here is 112 pages long. The plaintiff's complaint alone occupies 24 pages, single spaced. His proposed amended complaint alone occupies 12 pages, single spaced. Under the circumstances, and particularly in view of the plaintiff's having seen fit to request that the furnishing of an abstract be dispensed with, which request we allowed, it is especially and more than ordinarily necessary that the plaintiff-appellant's brief conform to our Rules. It does not do so. It flagrantly violates the Rules. It is not enough that a document called a brief be printed and filed, unless it contains a clear and distinct statement, such as is the proper purpose of a brief: COOPER v. MCCAFFERY et al. (1897) 77 Ill. App. 278. We are under no obligation to, and will not, search the record for possible error upon which an order may be reversed, - the appellant must specifically point out the alleged error and point out and present his reasons for urging such to be error, - and if he does not, we will not consider them: REICHELT v. ANDERSON (1921) 222 Ill. App. 176; BURK et al. v. WEBER et al. (1936) 285 Ill. App. 391. The brief

of the plaintiff-appellant here is not, in any respect, except that it is printed and is short, in compliance with Rule 7: SCHUYLER v. MAYERS and CO. et al. (1896) 56 Ill. App. 183.

Accordingly, for the above reasons, this appeal is dismissed.

DOVE, P. J. CONCURS

APPEAL DISMISSED.

Publish in Abstract

Gen. No. 11345 Agenda 3

In The 15 I.A.2d 1649

APPELLATE COURT OF ILLINOIS

Second District
Second Division
May Term - 1957

IRA HANDELMAN BLDG CORPORATION, Plaintiff-Appellee, vs. PATRICK DOLAN, Defendant-Appellant, L. L. HUGHES, Defendant.	Appeal from Circuit Court of Kane County.

SOL ISSERMAN, J.

This is an action brought by the Ira Handelman Building Corporation as landlord to recover rent under the terms of a written lease with the defendants, Patrick Dolan and L. L. Hughes. The defendants occupied a portion of the landlord's premises for the operation of a medical laboratory.

A judgment in the amount of $420.00 and costs of suit, amounting to $50.00, was initially obtained by the plaintiff upon a statement of claim and a cognovit contained in the terms of the lease. Thereafter, upon motion of the defendants, supported by affidavit, the trial court vacated the judgment and set the matter for hearing upon the issue raised by the defendants in their motion and affidavit. The defense interposed by defendants to the claim for rent was that of constructive eviction.

At the trial the parties entered into a Stipulation admitting the execution of a certain written lease, dated August 19, 1952, by the parties for a term of two years. It was further stipulated that the term was for two years commencing October 1, 1952, at a monthly rental of $89.00; that the lessees were in possession of the premises prior to the term in question under a previous tenancy, and remained in physical possession of the premises until sometime during the month of January, 1953, when they surrendered possession of the demised premises; that there was no rent currently due the landlord when lessees quit the premises; and finally, that on December 19, 1952, the defendants sent to the plaintiff, and the plaintiff received a certain notice in writing in which the defendants notified the landlord that in 30 days defendants were moving to a new location for the reason that the leased premises had proved undesirable because of lessor's failure to provide heat, janitor service and elevator service in accordance with the terms of the lease.

The written lease contained among its terms a specific provision that the lessor would at all reasonable hours during each day and evening during each winter term as required by the season furnish, at its own expense, steam heat for the heating apparatus of the demised premises. The lessor further agreed by the terms of the lease to keep the premises generally cared for and cleaned.

Plaintiff introduced testimony that the premises had remained unrented for six months following the defendants' surrender of possession, and claimed damages in the amount of rent for that period.

The defense advanced by the defendants was that the lessor's failure to provide heat, janitor service and elevator service in accordance with the terms of the lease amounted to a constructive eviction and released

them from the further payment of any rent following their surrender of possession of the demised premises. The testimony produced by the plaintiff landlord was limited to proof that the premises had remained unoccupied for six months following the defendants' departure in January of 1953, and the testimony of Griffith, the building manager from October 6, 1952 until the defendants' departure, that he had received no complaints from either Mr. Nolan or Mr. Hughes. Plaintiff offered no rebuttal testimony as to whether or not it had furnished heat and provided the other services required of it under the terms of the written lease. In contrast, the defendants called three witnesses to the stand in addition to themselves, each testifying to the fact that during the winter of 1952-1953 there were numerous times when the heat was 55 or 60 degrees, such as to prevent the defendants or the other tenants from carrying on their respective businesses and upon occasion forcing the occupants of the building to go home. Mr. Nolan and Mr. Hughes, their office girl, a furrier who maintained a place of business in the building, and one Bob Arthurs, who was manager of the building for a time, each testified unequivocally that the heat was inadequate or totally lacking several times during the winter of 1952-1953, either because of no fuel or because the heating units failed, and that the tenants, including Mr. Nolan and Mr. Hughes, complained frequently without success. Mr. Nolan's secretary testified that because of heat failures on several occasions they had to wear their coats and even cancel patients' appointments and go home themselves. Witness Bob Arthurs, who was plaintiff's agent in the management of the building, admitted that there were periods when there was no heat furnished to the tenants. In witness Arthurs' words: "Well, the heat was maintained when the unit wouldn't be out of service or the oil didn't run out or something like that. Of course, the oil was contracted for, but several times the supplier failed and so forth, and for different reasons there would be no heat."

In the view we take of this case, the question for determination is whether the alleged failure to furnish heat, together with the alleged acts of misconduct of the plaintiff, its agents and servants, constituted such a breach of the landlord's covenant as justified the defendants moving from the premises and refusing to pay further rent. The trial judge, sitting without a jury, answered this question in the negative. Appellant urges in effect that the judgment of the trial judge was contrary to the law and the evidence. We agree with appellant.

Physical ouster of a tenant is not essential to constitute his eviction, which may be constructive in character. A constructive eviction involves surrender of possession by the tenant on justifiable grounds rather than a deprivation of actual occupancy. It may result from the landlord's failure or refusal to perform the covenants and conditions of the lease, as, for example, failure of the landlord to furnish heat as required by the lease, Giddings v. Williams, 336 Ill. 484, 486, Lawler v. McNamara, 203 Ill. App. 285, 286. An act of the landlord of a grave and permanent character which renders the lease unavailing to the tenant or deprives him of the beneficial enjoyment of the premises, constitutes a constructive eviction. Automobile Supply Co. v. Sonneborn-Acton Corp., 340 Ill. 196, 201. There can be no constructive eviction, however, unless the tenant surrenders possession or abandons the premises within a reasonable time after such failure; in that event the tenant is relieved from payment of rent following his quitting of the premises, I.L.P. Landlord and Tenant, Sec. 355.

No brief was filed by the appellee in this Court, and accordingly we are not afforded the benefit of any arguments that it might have advanced. It does not appear from the record that any claim could be made that the tenants waived their right to vacate or that they waited an unreasonable time before vacating. Neither is there any significant conflict in the evidence.

The sum total of the evidence is that the landlord repeatedly, during the winter of 1952-1953, failed to provide heat such as to render the lease unavailing to the tenants and to deprive them of the beneficial enjoyment of the premises. These acts of the landlord were of a grave and permanent character. The defendants repeatedly registered complaints with plaintiff's agents in charge of the building, but without effect. Under the decided cases in Illinois and other jurisdictions, such constitutes a constructive eviction of the tenant and releases him from further payment of rent. Gibbings v. Williams, 336 Ill. 287; Automobile Supply Co. v. Scene-in-Action Corporation, 340 Ill. 196; See annotation in 69 A.L.R. 1093.

In view of the foregoing, we believe that the judgment of the trial court was contrary to the law and the evidence. We attach considerable significance to the admissions of the landlord's agent who conceded the numerous heat failures in spite of the defendants' repeated protests. We hold that the trial court erred in granting a judgment to the plaintiff and should have found for the defendants. Since the defendant, Dolan, is the sole appellant, we apply our order herein only to him. (Supreme Court Rule 35 (3), S.H.A., Ch. 110, Par. 101.35 (3))

The judgment of the Circuit Court is reversed and remanded as to the defendant, Patrick Dolan, with directions to the Circuit Court of Kane County to enter judgment for the defendant, Patrick Dolan.

Judgment reversed as to defendant, Patrick Dolan, and remanded with directions.

Wright J. Concur.
CROW, P.J. CONCURS

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

15 I.A.2d 50

October Term, A. D. 1957.

General No. 10127 Agenda No. 7

Rockford Life Insurance Company, an Illinois Corporation, Plaintiff-Appellant, vs. Production Press, Inc., an Illinois Corporation, C. Y. Rowe, Catherine Rowe, Reaugh Jennings, R. Y. Rowe, Jr., Millicent R. Samuell, F. Harris Rowe, Malinda Jennings and William Deutsch, Defendants-Appellees.	Appeal from the Circuit Court of Morgan County.

REYNOLDS, J.

This is a suit brought by Rockford Life Insurance Company, as a minority stockholder in Production Press, Inc., an Illinois corporation, against the majority stockholders and directors of the corporation. The relief sought was (1) restoration to the treasury of the corporation of 300 shares of stock alleged to have been unlawfully sold, (2) restoration by two officers of compensation paid to them

in addition to their salaries as officers, (3) voiding the action of the board of directors in increasing the number of directors from seven to eight without amendment of the articles of incorporation, and (4) voiding the action of the Board of directors in 1955 with respect to the election of officers and the appointment and fixing of compensation of a general manager of the corporation. The pleadings are voluminous, there being the original complaint, with four amendments, answers to each, and motions to strike the complaint and the amendments, and it would take much time and space to go into detail as to the pleadings and would serve no useful purpose. But in order to properly consider the matters involved, a certain amount of detail is necessary. Prior to 1940, the plaintiff, the Rockford Life Insurance Company, was the owner of 594 shares of the then 1280 shares of capital stock of the defendant, Production Press, Inc. On December 13, 1946, 300 shares of common stock held in the Production Press treasury was transferred to Reaugh Jennings for a purported price of $12.67 per share, making the total number of outstanding shares 1580. Prior to December 1946, 627 shares of the stock were owned by individuals who by marriage or blood relationship were or became members of the Rowe family. 594 shares were owned by the Rockford Life Insurance Company, and 59 shares were owned by two persons unrelated to the Rowe family and not connected with the Rockford Life Insurance Company. The sale of the 300 shares from the treasury of the corporation to Reaugh Jennings, who voted consistently with the Rowe

in addition to their salaries as officers, (2) voting the action of the board of directors [illegible] increasing the number of directors from seven to eight [illegible] of incorporation, and (3) voting [illegible] directors in [illegible] and the [illegible] [illegible] there being [illegible] [illegible] [illegible] but in order [illegible] [illegible] [illegible] plaintiff, the [illegible] of the [illegible] defendant, [illegible] of course [illegible] was referred [illegible] [illegible] 1700. [illegible] owned by individuals [illegible] were or became [illegible] owned by the [illegible] were owned by the [illegible] not connected with the [illegible] sale of the 300 shares from the treasury [illegible] to Joseph Jennings, who voted consistently [illegible]

group, increased the voting power of the Rowe group to 927 shares, and increased the outstanding shares to 1580. The Production Press, Inc. was incorporated in 1920 as Cloverleaf Press, Incorporated. Its charter provided for seven directors. The 1919 Business Corporation Act of Illinois, under which the corporation was incorporated provided that the number of directors could only be changed by amendment of the articles of incorporation requiring a two-thirds vote of the stockholders. The name of the corporation was changed October 27, 1934. At a directors meeting on July 10, 1951, an amendment to the by-laws of the corporation was adopted increasing the number of directors to eight. There was no amendment made to the articles of incorporation. The 1933 Business Corporation Act provided that the number of directors might be changed by amendment of the by-laws. The plaintiff contends that the number of directors could only be increased by an amendment of the articles of incorporation, by two-thirds vote. The defendants contend that the 1933 act applies to corporations organized under the 1919 act.

C. Y. Rowe was president of Production Press, Inc., for several years. In 1950 his salary was fixed at $265.00 per month, and the evidence shows that he was paid the sum of $197.36 additional compensation for claimed traveling expenses. In 1950 Catherine Rowe, wife of C. Y. Rowe, was elected secretary and her salary was fixed at 195.00 per month. The record shows that the sum of $1190.00 additional

compensation was paid to her during 1950 as extra time. The extra compensation payments were made without action on the part of the board of directors. There is the further claim that additional payments were made to both C. Y. Rowe and Catherine Rowe in other years. However, in a directors meeting in 1951, the additional compensation to C. Y. Rowe and Catherine Rowe for the year 1950 was confirmed, and additional compensation for 1951 was voted. In 1955, over the objection of the Rockford Life directors that the board was illegally constituted and convened, the board of directors elected officers and authorized the president to employ a general manager and fix his compensation. F. Harris Rowe, a nephew of C. Y. Rowe was elected president, [illegible] R. Samuelli, a sister of C. Y. Rowe was elected Vice President and Secretary, and R. Y. Rowe, Jr., a nephew of C. Y. Rowe was elected Vice President and Treasurer. After the election of officers, the elected president, F. Harris Rowe, appointed C. Y. Rowe as general manager and fixed his salary at $500.00 per month.

The stockholders have been at loggerheads for years, the Rowe group on one side and the Rockford Life Insurance Company on the other, finally culminating in this suit before us.

The cause was referred to a Master in Chancery and the Master in his report of proofs and findings, held that the sale of the 300 shares from the treasury of the corporation was not made in behalf of the best interests of all the

shareholders and recommended that the sale and transfer of the 300 shares be set aside; that said shares be restored to the treasury of the corporation and that the consideration paid for such shares be repaid to the purchaser. The Master further found that an officer who performs services apart from duties of his office at request or with acquiescence of the corporation, may recover compensation upon quantum meruit. The Master further held that the success of the corporation during the past ten years was due to a great extent to the unselfish and devoted attention by the defendants C. Y. Rowe and Catherine Rowe to the business affairs of the corporation; that they performed work far beyond their duties as officers and directors, and that all extra compensation paid them was supported by records of extra hours and out of pocket expenses. As to the increase of the number of directors from seven to eight, the Master held this action was legal and proper. The Master's report was objected to by both the plaintiff and the defendants. The trial court overruled the objections and approved and confirmed the Master's report. From that decree the plaintiff appeals. No cross-appeal was filed.

Since no cross-appeal was filed the matter of the restoration of the 300 shares of stock from the treasury of the corporation is not before us and need not be considered. This leaves the following matters to be passed upon. 1. Was the payment of extra compensation to C. Y. Rowe and Catherine Rowe, legal? 2. Was the increase of the number of directors

shareholders are required under that the sale and transfer of the 800 shares be set aside. [illegible] the treasury of the [illegible] for such [illegible] found [illegible] of the [illegible] position, [illegible] [illegible] the [illegible] and [illegible] [illegible] that the [illegible] and [illegible] supported by [illegible] to the [illegible] [illegible] [illegible] [illegible] [illegible] approve [illegible] the [illegible] [illegible].

Since [illegible] was filed the [illegible] restoration [illegible] the corporation is [illegible] not [illegible]. This leaves the following [illegible] [illegible]. 1. Was the payment of extra compensation to [illegible] X. [illegible] [illegible] [illegible], legal. X. Was the increase of the number of directors

from seven to eight legal without amendment of the articles of incorporation? While there are other questions raised, we believe a determination of these two questions will serve to determine the related issues raised by the appeal.

In considering the contention of the plaintiffs that the payment of additional compensation to C. Y. Rowe and Catherine Rowe was illegal, the duties of the two must be considered. C. Y. Rowe was a director and president of the corporation. Catherine Rowe was the treasurer. If the duties of these two offices are to be considered solely on the basis of what the law and the by-laws of a business corporation require, it might be held that the salaries authorized, namely $265.00 per month for the president and $195.00 for the treasurer were sufficient. But the evidence shows that the two devoted many hours of their time and efforts for the welfare and promotion of the corporation, above and beyond the scope of their duties as such president and secretary. Between the two of them they did proof reading, pricing, estimating, calling on customers, servicing customers, and like work of the corporation. Mr. C. Y. Rowe testified that there was never a week-end that he didn't take a large briefcase of work home with him and work on that during the week-end. That he called on the customers by automobile, and supervised the whole operation in general. Mrs. Catherine Rowe testified that she handled the financial records of

the corporation, proof read, priced work and that much of her work was done after regular business hours. The testimony in general shows that during the years 1946 to 1955, the business of the corporation increased considerably and that it was due largely to the work done by C. Y. Rowe and Catherine Rowe. The Master in Chancery held that the success of the corporation was due to a great extent to the unselfish and devoted attention by the defendants C. Y. Rowe and Catherine Rowe to the business affairs of the corporation and that they performed work far beyond their duties as officers and directors. That all extra compensation paid to them was supported by records of extra hours and out of pocket expenses.

There is no contention that the extra compensation paid C. Y. Rowe and Catherine Rowe was unreasonable. The sole contention is that the payment of the extra compensation was illegal, on the ground that their salaries had been fixed and that the payment of compensation to the two officers, in excess of their salaries was unlawful and improper.

It is true, as cited by the plaintiffs, that the officers and directors of a corporation stand in a fiduciary relationship to the corporation and its shareholders; that they are in effect trustees for all the shareholders. As said in Farwell v. Pyle-National Electric Headlight Co., 289 Ill. 157,

"The directors of a corporation are intrusted with the management of its business and property for the benefit of all the stockholders and occupy the position of trustees for the collective body of stockholders in respect to such business." This rule was affirmed in Goldberg v. Ball, 305 Ill. App. 273, where that court said: "A director is a trustee for the entire body of stockholders, and both good morals and good law imperatively demand he shall manage all the business affairs of the company with a view to promote, not his own interests, but the common interests, and he cannot directly or indirectly derive any personal profit or advantage by reason of his position, distinct from his co-shareholders." The same rule would apply to the officers of a corporation.

It is equally true, that a director of a corporation is not entitled, as against non-assenting stockholders, to receive a salary, however justly earned, unless previously authorized by the by-laws of the corporation or by resolution of the board of directors. Brown v. DeYoung, 167 Ill. 549; Hall v. Woods, 325 Ill. 114. But it must be realized that these cases relate only to salaries payable to these officers for the performance of their duties as such officers. There is a distinction to be made where an officer or director performs necessary services entirely outside the scope of his duties as a director or officer, at the instance of the officers of the corporation having general authority over the affairs of the corporation, under an express promise of payment for such

"The directors of a corporation are [illegible] the management of its business [illegible] all the stockholders are [illegible] the collective body [illegible]. This rule [illegible] where the court [illegible] body of stockholders, [illegible] he shall [illegible] of the [illegible] but the court [illegible] derive any [illegible] benefits, [illegible] would only [illegible].

It is [illegible] not entitled, [illegible] salary, [illegible] by the by-laws [illegible] the board of directors. [illegible] Lock, 300 Ill. [illegible] cases relate [illegible] other [illegible] the performance of their [illegible] is distinction to be made [illegible] director performs necessary services entirely outside [illegible] duties as a director or officer, at the instance of the officers of the corporation having general authority over the affairs of the corporation, under an express [illegible] such

services or under such circumstances as raise an implied promise to pay for them. Rockford, Rock Island and St. Louis Railroad Co. v. Sage, 65 Ill. 328; Cheeney v. Lafayette, Bloomington and Mississippi Railway Co., 68 Ill. 570; Holder v. Lafayette, Bloomington and Mississippi Railway Co., 71 Ill. 106; Chicago Macaroni Co. v. Boggiano, 202 Ill. 312; Joy v. Ditto, 356 Ill. 348; Stevens v. Industrial Com., 346 Ill. 495. This rule has been adopted by other jurisdictions. Pew v. First Nat. Bank, 130 Mass. 391; Fitzgerald & Mallory Construction Co. v. Fitzgerald, 137 U. S. 98; Watts v. West Virginia Southern Railway Co., 48 W. Va. 262, 37 S.E. 700; Henry v. Railroad Co., 27 Vt. 435; Brown v. Ice Co., 113 Iowa, 616, 85 N.W. 750; McCarthy v. Water Co., 111 Cal. 328, 43 Pac. 956. These cases hold that the officer or director who performs services clearly outside the scope of his duties as such officer or director, under circumstances as raise an implied promise to pay for them, is entitled to receive pay therefor. Applying the law of these cases to the facts in this case, C. Y. Rowe and Catherine Rowe were entitled to claim and receive pay for these services they rendered outside the scope of their duties as president and treasurer respectively, and the payment of the additional compensation to them for these extra services was clearly legal and proper. As to C. Y. Rowe, the extra compensation was for out-of-pocket expenses incurred in driving his automobile in calling on customers of the corporation, and was

services or water which circumstances do render [illegible] to pay for them. [illegible] and labor [illegible] Co. v. [illegible] [illegible] and [illegible] [illegible] Bloomington [illegible] v. [illegible] [illegible] Accrued [illegible] [illegible] 346; Stevens v. [illegible] [illegible] 306 [illegible] adopted by other [illegible] [illegible] 192 [illegible] 391; [illegible] 137 [illegible] 32; [illegible] [illegible] v. [illegible] [illegible] Water Co., [illegible] [illegible] the officer [illegible] the [illegible] of [illegible] [illegible] in spite of [illegible] [illegible] three [illegible] [illegible] they [illegible] and [illegible] compensation [illegible] legal and proper. [illegible] was for out-of-pocket [illegible] [illegible] mobile in calling [illegible]

only reimbursement of his expenses. As to Catherine Rowe, the extra compensation paid her, was for extra work, computed and paid on the basis of a forty hour week, and represented those extra hours over the forty hours. If the salary paid her was reasonable, any extra work computed and paid for on that basis would also be reasonable.

The remaining point to be decided is whether or not a corporation organized under the Business Corporation Act of 1919, could increase its number of directors without amendment of the articles of incorporation. The Business Corporation Act of 1933, did not require an amendment of the articles of incorporation, but only required an amendment of the by-laws. The increase of the number of directors from seven to eight was in 1951. The plaintiffs cite two cases in support of its contention that the increase was illegal without an amendment of the articles of incorporation, but both these cases were decided prior to the 1933 Business Corporation Act. The 1933 Act provides that "The number of directors may be increased or decreased from time to time by amendment to the by-laws." Ill. Rev. Stat. Chapter 32, Section 157.34. And in Section 157.156, it is provided that the provisions of the 1933 Business Corporation Act "shall apply to all existing corporations, including public utility corporations, organized under any general law of this State providing for the organization of corporations for a purpose or purposes for

only re[illegible] of [illegible] case. [illegible]
the entire component [illegible] year, [illegible]
[illegible] the [illegible] [illegible]
there only six hours over [illegible] [illegible]
was reasonable, may be [illegible]
basis was [illegible] reason [illegible].

The remaining issue is [illegible]
corporation [illegible] under the [illegible]
1919, could [illegible]
of the [illegible]
act of 1933, [illegible]
incorporation [illegible]
the [illegible]
was in [illegible]
contention [illegible]
of the [illegible]
[illegible]
not involve [illegible]
or decrease [illegible] be [illegible]
III, Sec. [illegible]
1957.156, it [illegible]
business purpose [illegible]
partners, [illegible]
under any general [illegible] for the
organization [illegible]

which a corporation might be organized under this Act". The case of Kreicker v. Naylor Pipe Co., 374 Ill. 364, while not passing directly on the question here, held: "By section 146 of the 1919 act, the legislature expressly reserved the right to amend, repeal or modify the Corporations Act at pleasure." While that case held that such power could not be exercised to abrogate rights that have become vested, it cannot be said that any such vested right exists here. Since the 1933 Act changed the method of increasing or decreasing the number of directors from an amendment of the articles of incorporation, by a two-thirds vote, to a mere amendment of the by-laws, the increase of the number of directors from seven to eight, under the authority of the 1933 Act, was legal and proper, and no amendment of the articles of incorporation was necessary.

The plaintiff contends that there are other improper acts on the part of the officers and directors, but only the payment of the extra compensation or the increase of the number of directors can be contended to be illegal and since we have held that these acts were legal, the matter resolves itself down to a group of minority stockholders objecting to actions by the officers and directors that appear to be legal and a matter of policy. The stockholders of a corporation, holding a majority of the capital stock of a corporation have the right to determine the policy of the corporation and to manage

and direct the corporation affairs, and the minority must submit to their judgment so long as the majority act in good faith and within the limitation of the law. The minority of the stockholders cannot dictate corporate policies. This is the age old rule that the majority shall govern. Here dissatisfaction with the acts of the officers elected by the majority is not enough. In this case there is no proof of any dishonest,illegal or improper acts of the directors or officers. There is no evidence of any impairment of the investment of the minority stockholders. On the contrary, the evidence shows a devotion by the officers to the best interests of the corporation, above and beyond the scope of their duties as such officers.

The decree will be affirmed.

Affirmed.

and direct the corporate [illegible]
submit to their [illegible]
faith and with the [illegible]
the stockholders [illegible]
the age of [illegible]
application with [illegible]
majority [illegible]
any dishonest, [illegible]
officers. There [illegible]
investment [illegible]
the avoidance [illegible]
interest [illegible]
their duties [illegible]
The [illegible]

20

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

October Term, A. D. 1957.

15 I.A. 2d 51

General No. 10125

Agenda No. 5

In the Matter of the Petition of Westmoreland, Inc., et al. for Annexation of Certain Territory to the City of Springfield, an Illinois Municipal Corporation.	
Westmoreland, Inc., John J. Donovan, Charles A. Manless Trust, Harry A. Bergmann, Roberta M. Bergmann and Springfield Marine Bank,	Appeal from the Circuit Court of Sangamon County
Petitioners-Appellees,	
vs.	
Helen Kunyan and Dorothea M. Sager, as Trustees of the Helen Kunyan-Dorothea M. Sager Trust,	
Objectors-Appellants.	

REYNOLDS, J.

In this case a petition was filed in the County Court of Sangamon County, Illinois, to annex certain territory to the City of Springfield, in accordance with the provisions of Sections 7-1, 7-2, 7-3, 7-4 and 7-5 of Article 7 of the Cities and Villages Act, Chapter 24, Illinois Revised Statutes, (1955). Six petitioners, owning 210 acres, filed their petition

asking that their land and 80 acres of land belonging to the objectors, be annexed to the City of Springfield. The petition was supported by affidavit that the signatures on the petition represented a majority of the property owners of record and the owners of record of more than 50% of the land in the territory sought to be annexed and a majority of the electors therein. Hearing on the petition was set for October 1, 1956, and the petitioners gave the proper notices as required by the statutes, and filed copy of the notice with the Clerk of the City of Springfield. Within the time allowed by law for filing of objections to the petition, the objectors, Helen Runyan and Dorothea A. Sager, as Trustees of Helen Runyan-Dorothea A. Sager Trust, filed their written objections, objecting to the inclusion of the 80 acres owned by them, on the grounds that the territory described in the petition was not contiguous to the City of Springfield, and that the objectors' land was located on the perimeter of the territory described; that the objectors did not desire annexation and that exclusion of the objectors' land from the annexation proceedings would not destroy the contiguity of the other described land sought to be annexed to the City of Springfield.

Hearings on the petition and objections were held in the County Court on October 1 and October 17, 1956. Prior to hearing evidence on the validity of the annexation petition, the Court heard and determined objectors' objection under Section 7-3 of Chapter 24, as required by the statutes. The

Court held that the objections were not valid. The Court then determined the validity of the annexation petition and in that matter held that the petition was valid. On October 17, 1956, the Court entered an order describing the territory to be annexed, found that the petition conformed to the law governing, and directed that the question of annexation be submitted to the corporate authorities of the City of Springfield for action under Section 7-5 of Chapter 24. The objectors then filed their Notice of Appeal and the matter now comes before this court.

There are no questions raised on the pleadings. Appellants base their appeal on two points. (a) The land sought to be annexed is not contiguous to the City of Springfield, and therefore may not be annexed; (b) since the objectors' land is located on the perimeter of the territory sought to be annexed, the objectors' land should have been eliminated from the petition for annexation.

The territory sought to be annexed borders on Pasfield Park Place, which is within the city limits of the City of Springfield, a distance of approximately 660 feet, on the north-eastern side. Pasfield Park Place is bordered on the east by the Chatham Road, which runs in a north and south direction, and the southeasterly tract of the land sought to be annexed also borders on the westerly side of Chatham Road. The land sought to be annexed is shaped like a square "C"

Court held that the objection [illegible] v. [illegible] has not been determined [illegible] by [illegible] the [illegible] matter [illegible] the [illegible] the Court [illegible] annexed, [illegible] as directed [illegible] to the [illegible] [illegible] filed [illegible] file [illegible]

[illegible] base [illegible] annexed [illegible] therefore [illegible] in [illegible] annexed, [illegible] the [illegible].

The [illegible] [illegible] 1 [illegible] [illegible] north-eastern [illegible] [illegible] by [illegible] direction, [illegible] be annexed [illegible] The land sought to be [illegible]

with the top of the "C" touching or bordering Pasfield Park Place on the east, and the bottom of the "C" touching or bordering on Chatham Road on the east. The objectors' land is an eighty acre tract at the bottom and back part of the "C". Immediately east of the objectors' land there is an eighty acre tract, which forms the bottom and front part of the "C" and this is the land which borders on the Chatham Road. The only part of the territory that touches the City of Springfield, is that part which extends 660 feet along the east side of the territory south to be annexed and along the west boundary of Pasfield Park Place. The territory sought to be annexed then extends to the west, then south, and then east, forming the "C", each tract adjoining the other, with the tract of the objectors, being to the south of part of the territory sought to be annexed, and west of the eighty acre tract bordering on Chatham Road on the south part of the territory.

Described further, the territory sought to be annexed, without regard to ownership lines, consists of land as follows:- A tract of land 660 feet in width, extending north and south, and 1980 feet long, extending east and west. (This is the top part of the "C".) This tract borders on the east with Pasfield Park Place, which is part of the City of Springfield. Immediately south of the west 660 feet of the last mentioned tract, a tract 660 feet in width, east and west, and 1320 feet in length, north and south. Immediately south of this last described tract, an 80 acre tract, 1320 feet wide, east and west, and 2640 feet long, north and south, with the

with the top of the "U" turning to easterly [illegible]
Place on the creek, and the [illegible]
northerly of [illegible]
an eighty acre tract [illegible]
immediately east [illegible]
one tract, [illegible]
and this [illegible]
only part of the [illegible]
is that [illegible]
the former [illegible]
of [illegible]
then [illegible]
the "U", [illegible]
the original, [illegible]
amount [illegible]
northerly [illegible]

Several [illegible]
although [illegible]
a tract [illegible]
and 1580 feet [illegible]
part of the [illegible] This tract [illegible]
Redfield [illegible]
Immediately north of [illegible] tract
tract, a tract 640 feet [illegible]
feet in length, [illegible]
last describe tract, [illegible] 1320 feet [illegible]
and west, and 2640 feet long [illegible]

easterly 660 feet of this tract bordering on the tract to the north. Immediately south of this 80 acre tract, last described, the 80 acre tract of the objectors, being 1320 feet wide, east and west, and 2640 feet long, north and south. (These last three mentioned tracts, form the back part of the "C"). Immediately to the east of the objectors' 80 acre tract, with a common border of 1320 feet along the south half of the easterly border of the objectors' tract, an 80 acre tract, 1320 feet wide, north and south and 2640 feet long, east and west, with this tract bordering on Chatham Road at its easterly border. (This last described tract forming the bottom part of the "C".) Inside the "C", lying west of Chatham Road, south of Pasfield Park Place and the first above described tract, east of the three tracts forming the back part of the "C" and north of the last mentioned tract, there is a tract or area of land, comprising 320 acres, 2640 feet in width, east and west, and 5280 feet long, north and south. This land is not included in the petition and is not a part of the City of Springfield. The only part of the territory sought to be annexed that borders upon the City of Springfield, is the tract that lies to the west of Pasfield Park Place. However, each of the tracts included in the petition to be annexed to the City of Springfield, have a common border with each other.

easterly 880 feet of this tract bordering on the river to the north. Immediately south [illegible] the 80 acre tract of the objectors, [illegible] feet [illegible], and west, and [illegible] feet long, north and south. [illegible] three mentioned in [illegible], form the [illegible]. Immediately [illegible] a corner [illegible] river of 1270 feet along the [illegible] easterly border of the [illegible] 1820 feet [illegible], north [illegible] west, with this tract [illegible] easterly border. [illegible] bottom part of the [illegible] Road, south of [illegible] described [illegible] part of the [illegible] is a tract [illegible] in width, [illegible]. This land is [illegible] of the City of [illegible], sought to be annexed [illegible] in the tract [illegible]. However, each of the tracts [illegible] annexed to the City of [illegible] corner with each other.

In passing on the questions presented it would seem that it will be necessary to define the words "contiguous" and "perimeter" as used in the statute.

Section 7-3 of Article 7, Chapter 24, Illinois Revised Statutes is in the following language:-

"After the filing of the petition but not less than five days prior to the date fixed for the hearing, any interested person may file with the county clerk his objections (1) that the territory described in the petition or ordinance, as the case may be, is not contiguous to the annexing municipality, (2) that the petition is not signed by the requisite number of electors or property owners of record, (3) that the description of the territory contained in the petition or ordinance, as the case may be, is inadequate, or (4) that the objector's land is located on the perimeter of such territory, that he does not desire annexation, and that exclusion of his land will not destroy the contiguity of such described property with the annexing municipality."

Funk & Wagnall's New Standard Dictionary defines "contiguous" as follows: "touching or joining at the edge or boundary; close together; adjacent; adjoining." Webster's New International Dictionary, 2nd Edition, defines the word as: "in actual contact, touching; also near though not in contact; neighboring; adjoining; near."

In pondering on the question presented it will be seen that it will be necessary to define the terms "[illegible]" as used in the statute.

[illegible] is a language by which [illegible] difference in the [illegible]

[illegible] the [illegible]

[illegible]

(3) [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

"[illegible]" is followed: "[illegible] or [illegible] close to [illegible]". [illegible] the word [illegible] "[illegible]", [illegible] not in [illegible] neighborhood [illegible].

Words and Phrases, Vol. 9, page 90 in listing the word uses the words "abutting, adjacent, compact or adjoining, near to or in close proximity."

In 37 American Jurisprudence, page 644, it is said: "The annexation of outlying territory to a municipality is commonly conditioned by the statute authorizing the proceeding on the situation of the territory to be annexed, it being required to be adjacent or contiguous to the municipality". And on page 645, the rule is laid down as follows: "While the general rule is that land cannot be annexed to a city or town unless it is contiguous thereto, it is not necessary that each and every tract of land sought to be annexed shall be contiguous to the municipality. If all of the tracts are contiguous to each other, and one of them is contiguous to or adjoins the municipality, that is sufficient."

McQuillin's Municipal Corporations, 3rd Edition, Vol. 2, Section 7.20 says: "Several tracts may be annexed as being contiguous if one tract is contiguous to the municipality and the other tracts are contiguous to each other."

In the text books cited, there are no Illinois cases directly in point. A search for decisions of Illinois courts on this question disclose very few cases on the question of contiguity. A number of the cases cited in the briefs of the appellants and the appellees are cases deciding and setting forth the powers of the cities or villages, but not touching directly on the issue here. The few cases that

words and phrases, Vol. 3, page 90 in listing the words and the words "abutting, adjacent, contiguous, [illegible] or in close proximity."

In 37 Michigan Jurisprudence, page [illegible] it is said:

"The [illegible] only [illegible] on the [illegible] required to be [illegible] and on [illegible] the general [illegible] town [illegible] but [illegible] be conducive to the [illegible] conditions to each [illegible] or adopts the [illegible]."

In [illegible] section [illegible] conditions [illegible] and the other [illegible]

In the [illegible] directly [illegible] county or this [illegible] condition [illegible] proximity. [illegible] the bridge of the [illegible] and nothing [illegible] not touching directly in the [illegible]

are pertinent seem to have been decided upon their own special state of facts. Several of the cases cited in the briefs are cited by both the appellants and appellees as supporting their contentions. In order to reach a decision in this cause, it will be necessary to briefly examine the facts in these cases cited.

In the case of Wild v. The People, 227 Ill. 556, where the Village of Weston sought to incorporate certain territory, some of the tracts merely cornered on each other. And the court in holding the incorporation invalid, said: "From the main body of the territory included within the limits of the pretended village it will be observed that long and narrow strips of land which are within the boundaries extend in various directions. From a point on the north line of section 11 a strip 310 feet in width east and west extends south a half mile, where it corners with another strip 200 feet in width east and west, which extends south a half mile and then intersects the north line of another strip 2000 feet in length from east to west and 200 feet in width from north to south. The only connection which these strips have with the other territory is the junction of the 310-foot strip at its northern extremity with the south line of the main body of such other territory. The only way in which the 310-foot strip touches or adjoins the 200-foot strip is by the fact that they corner with each other. The west line of the first

extended is the east line of the second, and the south line of the first extended is the north line of the second. No vehicle, and, in fact, no person, could pass from one strip to the other without passing over or upon lands not within the village. The two strips last mentioned are not contiguous." And the court in that case continuing, said: "It is also to be observed that from the main body of the territory a strip 570 feet in width east and west extends south from a point near the north-west corner of section 10 almost one mile to the south line of that section, and from the south fifty feet of that strip another strip fifty feet in width from north to south extends west a half mile, where it intersects the east line of a body of land 1000 feet in length from north to south and 550 feet in width from east to west, all included within the village. It is apparent that the 50-foot strip is merely included for the purpose of connecting the piece of ground at the west end thereof with other territory in the village. It is also apparent that the piece of ground at the west end of the strip is not, in fact, contiguous to grounds in the village other than that strip. The use of that strip to connect the tract at its western extremity with other territory in the village is a mere subterfuge and not a compliance with the law."

In the case of City of Chicago v. Equitable Life Soc., 8 Ill. 2nd, 341, which was a case of eminent domain, the land owner sought to have two tracts, separated by a public street

considered as being contiguous, the contention of the land owner being that the two properties are so interrelated as to be contiguous. The court held the two tracts were separate tracts, and were not contiguous.

The case of Wolbach v. Village of Flossmoor, 329 Ill. App. 528, was a case involving the disconnection of certain land from the village. In that case the tract sought to be disconnected cornered on the village, and the court citing the case of Wild v. People, 227 Ill. 556, held that the two tracts were not contiguous.

In the case of Morgan Park v. City of Chicago, 255 Ill. 190, it was sought to annex the Village of Morgan Park with the City of Chicago. The City of Chicago was east of the village and the north and south portions of the village adjoined the city with a common boundary between them. The city and village did not adjoin each other near the center and their territory there was not contiguous for a considerable distance, and between the city and the village there was about two hundred acres of land which if the annexation was allowed, would be ringed about by the city limits. As said by the court in that case, it would have resulted in a mere ring, hoop or belt around the unincorporated area. And the court said that such a matter was never contemplated when the statute for annexation was enacted. And as to the suggestion that the annexation could be done in separate parcels, or piecemeal, would be equally objectionable, since the city

could not do indirectly what could not be done directly. But the next year, the legislature corrected this objection, that of the enclosed territory, by the enactment of a law permitting the enclosing of unincorporated territory and that law remains substantially the same today, namely Section 7-13 of Article 7, Chapter 24, Illinois Revised Statutes, where it says: "Where a municipality adjoins another municipality in one or more portions of its boundaries, it may be annexed thereto as follows, notwithstanding that territory not a part of either of the municipalities may lie between or be surrounded by the municipalities:"

In the case of People ex rel. Montgomery v. Bigman, 415 Ill. 32, it was proposed to merge the two cities of Champaign and Urbana. A petition was filed in the Circuit Court of Champaign County by electors of each city to unite the two cities into one municipality. The trial judge ruled against the merger on the ground that the two cities were not contiguous within the meaning of the law. The two cities are divided by a line running north and south and their boundaries are contiguous on this line except at the south end of the line where the boundary lines of the two cities divide around a cemetery, then unite at the south line of the cemetery and from that point the common boundary line of the cities proceeds to the south boundary line of each city. Apparently the trial judge relied upon the decision of Morgan Park v. City of Chicago, 255 Ill. 190, but on appeal the Supreme Court differentiated the facts

from those in the Morgan Park case, where the enclosed area was approximately 200 acres, and that of the cemetery which was small in area. The court said: "In giving effect to the word 'contiguous' no strained, strict or unusual definition should be applied, but practical and common sense should prevail by adopting the sense best harmonizing with the context and promoting the apparent policy and objects of the legislature in the light of the general purposes of the act."

In the case of Gilbert v. Morgan, 98 Ill. App. 281, the question of disconnecting certain land from the village of South Elgin involved the question of contiguous tracts of land. The court said: "We do not think the provisions of the statute are intended to be restricted so as to benefit the owners of those several tracts of land which actually touch the borders of the corporation, but rather that it is intended to include any territory composed of contiguous tracts, a portion of which touches the border, although the several parts of it may be owned by different owners."

The School Law of Illinois concerning annexation or formation of a school district involves the question of compactness as well as contiguity. But, it is not required that the area within the district be in a quadrilateral or definite shape. There may be irregularities in the boundaries and still compliance with the statute governing. People v. Merrin, 284 Ill. 368;

People v. Crossley, 261 Ill. 78; People v. Swift, 270 Ill. 532. In the latter case, the court defining territory as contiguous said that territory was contiguous when it was united or joined together. The case of People v. Crossley, heretofore cited, held that the language "contiguous and compact" must have a reasonable construction in view of the subject matter to which it is applied.

In the case of People v. Graham, 301 Ill. 448, a school district case, speaking of objections to the organization of the school district, said: "The courts will not look with favor upon frivolous objections, based on imaginary ills. The administration of the school system, like the administration of all systems designed for the benefit of the public at large, requires the application of common sense, as well as established law, in order to carry out the purpose of the mandate of the constitution."

The case of People ex rel. Sabin v. Barnes, 406 Ill. 228, involved the annexation of certain industrial property to a school district. In that case the territory sought to be annexed was the Shell Tank Farm where large amounts of oil and gasoline were stored with no actual residents or at best only a few. The court in holding the annexation proper said: "The territory need not be rectangular or square to be contiguous and compact."

Unfortunately no court in Illinois has passed directly on the point at issue here. There is no question that a certain part or tract of the land sought to be annexed here

is contiguous to a portion of the City of Springfield. Also, there can be no question, that the various tracts involved, are contiguous to each other, in that each tract has a common boundary with another tract. It is equally true, that if the land of the objectors is left out of the annexed territory, it must of necessity break the contiguity of the other territory sought to be annexed with the lower or south eighty acre tract lying east of the objectors' land. The question is whether or not several tracts, contiguous to each other, although irregular in shape, with only one portion of the land sought to be annexed being contiguous with the municipality, is such a tract of land that is contiguous to the annexing municipality as required by Section 7-3 of Article 7, Chapter 24, Illinois Revised Statutes.

In passing on this question this court is not unmindful of the fact that any hard and fast rule laid down could result in an absurdity such as the one disclosed in the case of half-mile long 50 foot strip connecting a large tract as shown in the case of Hild v. The People, 327 Ill. 556. Or, that a number of landowners and electors, residing in a strip of land 500 feet wide, ten or fifteen miles long, could qualify under the theory that their lands or tracts were contiguous to each other and the one end was contiguous to the municipality. In fact, there would be no limit to the extent of such a strip, except where it interfered with or ran into another municipality. Another absurdity that might arise would be the instance of one small landowner in the middle of the strip,

who opposed annexation would be in the position of breaking the contiguity and therefore foreclosed from objecting. The possibilities for absurd and distorted annexations are numerous, but there must of necessity be some declaration of law on the subject. Realizing that any such declaration of law must be based upon common sense and the intention of the legislature, we must hold in this case that the land sought to be annexed was contiguous as provided by the statute and that the trial court did not err in so holding.

It was admitted by the objectors by the testimony of one of the objectors that they planned to subdivide their land into residential lots in the near future and that they had already had a preliminary plat prepared, and that they were attempting to arrange for a water supply from the city of Springfield. This testimony would tend to show that the objectors themselves regarded their land as "urban" instead of "farm land". They want to enjoy the advantages of city property, but not be a part of the city and pay their proportionate share for these advantages. While this is beside the point here, as a matter of common justice, the objectors cannot have their cake and eat it too.

It is the opinion of this court that while no hard and fast rule for other cases can be laid down, that where there is a contiguity with a municipality of one border of the land

sought to be annexed, and the other tracts of the land are contiguous with each other, that is, have a common border or reasonable length or width, that such area is contiguous as required by the statute, without too much regard for the shape of the land in question. This opinion is subject, of course, to the proposition that each case must present its own problems and that where an absurdity exists, the court can only adopt a common sense interpretation of what is or is not contiguous, as required by the statute, and in compliance with the intention of the legislature. Here, we believe the contiguity is such that it falls within the plain intent of the legislature and the statute. The statute was designed to permit cities and villages to annex territory outside its borders, that desired such annexation. In following that intent, as previously said by our Supreme Court in the case of People v. Graham, 301 Ill. 446, "The courts will not look with favor upon frivolous objections, based on imaginary ills. The administration of the school system, like the administration of all systems designed for the benefit of the public at large, requires the application of common sense, as well as established law, in order to carry out the purpose of the mandate of the constitution." That was a school case, and this is annexation to a city, but the principle is the same. The law was enacted with the plain intent of permitting the annexation of territory contiguous to or adjacent to the villages and cities. It was for the benefit of the public

sought to be annexed, and the two tracts of the land are contiguous with each other, that is, have a common border of reasonable length or width, they are [illegible] contiguous as required by the statute, [illegible] for the [illegible] of [illegible] into the [illegible] [illegible] the [illegible] and [illegible] the court [illegible] contiguous [illegible] as required by the [illegible] of the [illegible] [illegible] the statute. [illegible] villages to annex [illegible] such annexation. [illegible] by our Supreme Court [illegible] 446, [illegible] jections, because, on [illegible] school system, like the administration [illegible] for the benefit of [illegible] of common sense, as well as [illegible] to carry out the purpose of the [illegible] constitution." [illegible] was a school case, and this is annexation to a city, but the [illegible] is the same. The law was enacted with the plain intent of permitting the annexation of territory contiguous to or adjacent to the villages and cities. It was for the benefit of the public

and no strained or distorted interpretation should be indulged in by our courts in passing on the question.

The second point raised by the appeal is the claim on the part of the objectors that their land is on the perimeter and should be excluded. Perimeter has been defined as "the whole outer boundary of a body or figure, or the measure of the same. Periphery or outline; also near, surrounding space." Webster's New International Dictionary, 2nd Edition. It might also be defined as the outer edge. It is true that the west and south portion of the objectors' land on the south and west sides thereof, is the outer boundary of the land sought to be annexed. This is equally true of any of the other tracts, since all of them have a boundary that is part of the outer boundary of the tract sought to be annexed. We believe a common sense interpretation would be such tracts that project out from the main body of land, or those tracts that are at the extreme end could be considered as being on the perimeter. To hold otherwise would be to hold that all the land sought to be annexed is on the perimeter. But being on the perimeter is not enough. The statute also requires that before a valid objection can be made, that the exclusion of the land sought to be excluded must not destroy the contiguity of such described property with the annexing municipality. Here it is clear that the exclusion of the objectors' land will destroy the contiguity of the 80 acre tract lying to the east of the objectors' land. For that reason this objection has no merit.

Affirmed.

19 A

Abstract

15 I.A.2d 52

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

October Term, A. D. 1957.

General No. 10126 Agenda No. 6

LaFayette L. Irwin, Jr., Plaintiff-Appellee, vs. William S. Irwin, Arthur H. Irwin and Leonard H. Irwin, Individually and as Executors of the Will of LaFayette L. Irwin, Sr., deceased, Defendants.	Appeal from the Circuit Court of Sangamon County
William S. Irwin, Defendant-Appellant.	

Boeth, J.

This case was filed in the court below by appellee, LaFayette L. Irwin, Jr., alleging the making of, and seeking specific performance of, a parol agreement between himself and his three brothers, William S. Irwin, Arthur H. Irwin and Leonard H. Irwin, who were the four sons and sole heirs at law of LaFayette Irwin, deceased, by which they agreed that the property of their father should be divided equally between them share and share alike, although the will of the deceased gave the property to William, Arthur and Leonard and made no provision for LaFayette, Jr.

The said William S. Irwin, Arthur H. Irwin and Leonard H. Irwin, individually and as executors of the last will and testament of LaFayette Irwin, were made defendants to the suit. William S. Irwin filed his separate answer denying the agreement and alleging that there was no note or memorandum in writing evidencing the agreement as required by Illinois Revised Statutes 1955, Chap. 59, Sec. 2. Arthur H. Irwin and Leonard H. Irwin by their answer admitted the allegations of plaintiff's complaint and concurred in the prayer thereof. The court below found that the agreement had been made and decreed specific performance thereof. Only William S. Irwin has appealed so that the only parties before this court on appeal are the appellant, defendant below, William S. Irwin, and the appellee, plaintiff below, LaFayette I. Irwin, Jr..

At the outset, it appears that the estate of LaFayette Irwin, deceased, consisted of personal property of the approximate value of $46,000.00 and unimproved real estate worth between $150.00 and $200.00. On oral argument before this court it was agreed by counsel for both parties that the value of the real estate is so trifling and inconsequential when compared to the value of the personal property that it may be disregarded under the principle of De Minimus Non Curat Lex, so that the case may be regarded as affecting only personal property, thereby giving this court jurisdiction of the appeal.

The law is well established, that courts of equity look with favor upon the settlement of disputes among members of a family

[illegible]

[illegible] Irwin, [illegible] of Laverock [illegible] Irwin filed [illegible] that there was [illegible] agreement [illegible] No. 2. [illegible] satisfied the [illegible] the [illegible] been made [illegible] Irwin [illegible] on appeal are the [illegible] and the [illegible]

[illegible] Irwin, [illegible] value of $[illegible],000.00 [illegible] and $[illegible]. [illegible] by counsel for both parties that the [illegible] so building and [illegible] personal property but it may be [illegible] of De Mirjuus [illegible] law, [illegible] affecting only personal property, [illegible] jurisdiction of the appeal.

The law is well [illegible], [illegible] with favor upon the [illegible] of [illegible] [illegible]

by agreement and will readily enforce, by specific performance, such agreements. The disputes of rival claimants to an estate are fair subjects of compromise and settlement, and the mutual concessions of the parties for the prevention of litigation afford a valid consideration for the agreement. Where there is a reasonable basis for the belief that prolonged and expensive litigation will result over the proceeds or distribution of an estate, that the estate will be materially depleted, and that the family relationship will be torn asunder, the parties interested are warranted in preventing such family controversy by a settlement agreement. Anderson v. Anderson, 380 Ill. 488, 44 N.E. 2d 43. It is further the law that proof of the contract must be clear and convincing so as to leave no reasonable doubt. Anderson v. Anderson, supra, and cases therein cited. It therefore becomes necessary to examine the evidence to determine whether the facts shown bring the case at bar within the foregoing principles.

Certain facts, which have a bearing on the issues involved, are not disputed. The plaintiff was the oldest of the four sons. From 1947 to the date of the death of the father he managed and looked after the business of his father. The will of LaFayette Irwin is dated May 11, 1950, and the testator died October 2, 1950. In addition to the property in the estate, there was other real estate which was jointly owned by the four sons, subject to a life estate in their father, which the defendants did not want partitioned

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estate which was jointly owned by the four sons, and [illegible] to a life
estate in their father, which the testatrix she did not [illegible]

by a partition suit. Further, the three defendants were suspicious of the dealings of the plaintiff, in the handling of his father's business affairs from 1947 to the date of his death and believed that an inquiry would reveal that plaintiff was dishonest and had appropriated money to his own use from his father. The attorney representing the three defendants as executors was contemplating court action to investigate these matters. This is the background for consideration of the record in this case.

LaFayette Irwin, Jr., the plaintiff, testified that at the time of the probate of the will he told his brothers that if he didn't get a one-quarter share of the estate he would file a will contest suit. At that time he had employed two attorneys. On October 11, 1950, the four sons had a meeting in the office of attorney James Martin, who was representing the defendants as executors. Attorney James Martin representing the defendants and attorneys George Hoffman and Coy Overaker, the latter since deceased, representing plaintiff were also present. He further testified that James Martin, in the presence of all of the foregoing persons, asked him whether he had any intention of partitioning the real estate owned by the four sons and that he replied in the negative; that Martin thereupon said, "My clients have agreed that if there is no dishonesty on your part, and you let me have about ten days to two weeks to discover if there was, and if you cooperate with us and show us all your records, your files and the books, what you have, your bank book, check books and all, my clients have agreed to give

by a partition suit. Within, the three defendants are conducting
of the dealings of the [illegible], in the [illegible]
business affairs from [illegible] to the date of [illegible] as indicated
that an inquiry would reveal that [illegible] and
appropriated money to his own use [illegible]. The attorney
representing the three defendants in [illegible]
court motion [illegible]
for consideration of the record in this case.

Respectfully [illegible]

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counsel suit. [illegible]
October 11, 1950, the [illegible] of
attorney [illegible]
executors. Attorney [illegible]
attorneys [illegible] Joe Ferguson, [illegible] joined,
representing [illegible]
James Martin, in his [illegible] of all of [illegible] marriage, noted
his whether he was any [illegible] of [illegible] the real estate
owned by the four [illegible] Martin [illegible]; some
Martin [illegible] suit, "My client [illegible] if there is no
dishonesty on your part, and you let me have about ten days to two
weeks to discover if there was, and if you cooperate with us and
show us all your records, your files and the books, what you have,
your bank book, check books and all, my clients have agreed to give

you one-fourth of the estate of your father." He further testified that he agreed not to file a will contest suit if the investigation disclosed any dishonesty on his part; that at the conclusion of the meeting James Martin said, "Now it is all agreed" and "Now that is agreed by everybody here" whereupon they all indicated it was agreed and not one of them said no; that they all left the meeting happy and with the belief that all trouble was over. LaFayette Irwin, Jr., further said he thereafter made a number of trips to the office of attorney Martin, showed him his records and check books, answered his questions and made in general a full disclosure of his handling of his father's business affairs.

Attorney James Martin, testifying on behalf of plaintiff, said that he was called on the telephone by attorney Coy Overaker who told him that he and George Hoffman were representing the plaintiff; that plaintiff intended to contest the will of his father and suggested a meeting of all the parties and their attorneys to see if some agreement could be arrived at. Martin called the three defendants and arranged the meeting for October 11, 1950 and arranged to have them in his office for a conference prior to the general meeting. The defendants arrived in advance of the plaintiff and his attorneys. Martin discussed with them the matter of partitioning the real estate owned by the four and that none of them wanted it partitioned. He says that the end result of the conference was an agreement by defendants that if an investigation by him of the plaintiff's dealings with his father disclosed no irregularities,

they would agree to give the plaintiff a one-fourth share in the estate and that he was authorized to make this proposal to the attorneys for plaintiff. He further testified that at the meeting of all the parties, he communicated the proposal to the plaintiff and his attorneys, whereupon plaintiff agreed not to file suit for partition and agreed to cooperate with an investigation and to make available all information concerning the handling of his father's affairs. Martin further testified that after the discussion he asked all four brothers whether the proposal was understood and agreed upon and that the attorneys for plaintiff indicated it was agreeable, the defendant Arthur Irwin said "yes", the defendant Leonard nodded and the defendant William said nothing; that all parties left the meeting on a note of comparative harmony. Martin says he thereafter, with his partner, made a thorough and complete examination of the records of the plaintiff and found no evidence of any irregularity in his handling of his father's affairs and that he so advised his clients. He testified that he subsequently learned that William Irwin was refusing to comply with the agreement and had employed another attorney. On January 16, 1951, Martin wrote the following letter to each of the three defendants:

> "I have received a telephone call from George Hoffman representing Lafe Irwin. He has specifically asked me whether there was any possibility of settlement of the difficulties existing between Lafe and you three. Lafe wants one fourth of the estate as you know. George said that he would give us a couple of weeks time to give him an answer. If he doesn't hear or if I can give him no satisfactory answer, then he is going to file a suit to set aside

they would start to give me [illegible]
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attorneys for [illegible]
of all the [illegible]
and his attorney, [illegible]
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he so advised the [illegible]
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and had employed an [illegible]
the following letter to [illegible]

> I have received a [illegible] call from [illegible]
> [illegible] and [illegible]
> asked me whether [illegible] any possibility of [illegible]-
> ment of the [illegible]
> you three. [illegible] found [illegible]
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> couple of weeks [illegible] give him an answer. If [illegible]
> doesn't hear or if I can't give him no [illegible]
> answer, then he is going to [illegible]

> the will and at the same time a suit to partition the real estate. He tells me that he has also talked to Lindner, Bill's lawyer. Lindner said that he could not give him an answer and would have to talk to Bill. Please advise your wishes in this respect."

On further examination Martin undertook to explain the use of the language in this letter as indicating that he believed the parties had arrived at an agreement and that he understood that defendant William Irwin was unwilling to comply and that the attorneys for the plaintiff were wanting to know what was to be done.

The defendant Arthur H. Irwin testified on behalf of the plaintiff. He corroborates the testimony of attorney James Martin. He testified that at the conference of the three defendants prior to the general meeting, it was agreed that if there was no evidence of dishonesty on the part of the plaintiff and if plaintiff would promise not to file a partition suit, they would give plaintiff one-fourth of the estate; that at the meeting of all parties Martin said, "My clients have agreed if you file no partition suit, and if you permit us to examine your records-- if we find no evidence you have already gotten your share, my clients say they would be willing to see that you get one-quarter of the estate." He also said he went over the records of the plaintiff with Martin and that Martin advised him that there were no irregularities.

The defendant Leonard H. Irwin also testified on behalf of plaintiff and he likewise corroborated the testimony of Martin in the essential particulars.

The defendant William S. Irwin testified in his own behalf. He denied making any agreement to give his brother LaFayette one-fourth of the estate. He says that meeting of October 11, 1950 was with regard to the partition suit and that nothing was said about an investigation of his brother LaFayette and that there was no suggestion of giving a one-fourth share in the estate to the plaintiff. He denied giving Martin any authority to agree on his behalf to give his brother a one-fourth interest in the estate.

Finally it should be noted that no partition suit was filed by plaintiff.

If the testimony of the plaintiff and his witnesses is given credence, the record in this case meets the tests laid down by the decisions of the Supreme Court of this state. There was ample evidence from which the trial court could conclude that an agreement was made and that the plaintiff fully complied with such agreement. Where there is a conflict in the evidence, the findings of the chancellor are entitled to great weight and consideration and will not be disturbed by a court of review, unless palpably against the manifest weight of the evidence. We cannot say in the case at bar that the findings of the chancellor are against the manifest weight of the evidence. Likewise the trial court was fully justified in finding that the Statute of Frauds did not prevent the granting of specific performance.

Accordingly the decree of the Circuit Court of Sangamon County will be affirmed.

Affirmed.

Carroll, P.J., and Reynolds, J., concur.

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A

No. 11102 (Publish Abstract Only) Ag.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
(First Division)

OCTOBER TERM, A. D. 1957

15 I.A.2d 125

FILED

PAUL V. WUNDER

DONALD E. ROOP, Plaintiff-Appellant, vs. FARMERS AUTOMOBILE MANAGEMENT CORPORATION, a corporation d/b/a The Farmers Automobile Insurance Association, an Inter-Insurance Exchange, Defendant-Appellee,	Appeal from the Circuit Court, Lee County.

McNEAL, J.

This action was brought to recover the amount provided for medical payment under an automobile liability policy issued by defendant to plaintiff. The circuit court denied plaintiff's motion for summary judgment, granted defendant's motion therefor, and entered judgment in favor of defendant. Plaintiff appealed.

From plaintiff's complaint and defendant's motion for summary judgment and attached affidavits it appears that defendant issued its automobile and comprehensive personal liability policy to plaintiff in February, 1955, to cover the period February 12 to August 12, 1955, and that "Coverage I - Medical Payment" was limited to $750. Under the section of the policy entitled "Insuring Agreements", the paragraph relating to such coverage provides as follows:

"Coverage I - Medical Payments - Automobile: To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, ambulance, hospital, professional nursing and funeral services, to or for each person who sustains bodily

injury, sickness or disease, caused by accident, while in or upon, entering or alighting from the automobile if the automobile is being used by the named insured or with his permission."

Another section of the policy captioned "Exclusions" reads in part as follows: "This policy does not apply: * * * (m) under coverage I, to bodily injury to or sickness, disease or death of any person if benefits therefor are payable under any workmen's compensation law."

On May 3, 1955, plaintiff sustained accidental bodily injury while driving the automobile described in the policy and thereby incurred necessary medical, surgical and hospital expenses amounting to $1393.85.

At the time of the accident plaintiff was working for Butler Sand and Gravel, Inc., which was operating under the Illinois Workmen's Compensation Act. He was injured during the course of his employment and was paid compensation amounting to $0895.35 by his employer's compensation carrier. Under its right of subrogation the carrier was reimbursed to the extent of the amount paid plaintiff.

Defendant contends that since plaintiff received an award under the Compensation Act, he is precluded from recovering medical payments under the policy. Plaintiff's theory is that the purpose of the exclusion clause is to prevent a dual recovery; and that recovery should be allowed here because he has made no recovery and has received no benefits under the workmen's compensation law that he could legally retain.

In Fogelmark v. Western Casualty & Surety Co., 11 Ill. App. 2d 551, cited by plaintiff, this court considered provisions of an automobile insurance policy identical with those involved here, except in that policy the coverage was designated as "C" and the exclusion was referred to as "g". The court held that the receipt of death benefits under the Workmen's Compensation Act by a widow of a deceased employee did not relieve the insurer of its obligation to pay

reasonable funeral expenses for which compensation was not paid or payable under the Compensation Act. This court said that under the factual situation presented in the Fogelmark case there was no provision in the Compensation Act for payment of funeral expenses for the deceased employee; that by the terms of the Exclusion the provisions of the Illinois Compensation Act had been incorporated into the policy; and that on the date the contract of insurance was entered into and the date the insured met his death, section 8 (a) of the Act provided that in the case of a non-fatal accident, compensation should be paid an employee for accidental injury as follows:

"(a) The employer shall provide the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury. . . ." At page 558 the court said: "Had the plaintiff or her testate been paid compensation under the provisions of section 8 (a) as a result of his accident, it is apparent that the terms of Exclusion (g) would preclude further recovery for the medical, surgical and hospital expenses, enumerated in Coverage C, which arose out of the accident for which compensation was paid."

In the instant case the uncontroverted facts established by the pleading upon which the summary judgment appealed from was entered, show: that plaintiff received benefits totaling $6895.35 under the Illinois Compensation Act for injury sustained during the course of his employment; and that the provisions of section 8 (a) of the Act in effect in February and May, 1955, when the insurance contract was made and when plaintiff sustained injury, were incorporated in the policy. The provisions of section 8 (a) then in effect (Par. 138.8 (a), Ch. 48 Ill. Rev. Stat. 1953) are identical with the provisions of said section set forth in the Fogelmark case. It follows that such compensation benefits included payment for plaintiff's necessary medical,

surgical and hospital services; and therefore that plaintiff is precluded by Exclusion (m) from any recovery under Coverage I.

Plaintiff contends that he made no recovery of his necessary medical, hospital and surgical expense that he could legally retain. To the extent of the compensation paid him plaintiff could not retain the amount received from the third person who caused his injury, and plaintiff was required by section 5 (b) of the Act, from the amount so received, to pay his employer an amount equivalent to such compensation. However, plaintiff was and still is entitled to retain all compensation payments covering the expenses mentioned. To permit plaintiff to recover medical payment under Coverage I in addition to the payments for medical and hospital expenses received from the compensation carrier would amount to a dual recovery. In the Fogelmark case this court said that the obvious purpose of the exclusion provision in the policy is to prevent dual recovery for the same items of medical and hospital expense resulting from a single accident.

In our opinion the learned trial judge's decision to deny plaintiff's motion for summary judgment and to grant defendant's motion therefor was correct. Accordingly the judgment of the Circuit Court of Lee County is affirmed.

Judgment affirmed.

DOVE, P. J., and SPIVEY, J., concur.

surgical and surgical services, and the other [illegible]
presumed on continuation [illegible]

[illegible]
medical [illegible]
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physicians [illegible]
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and patients [illegible]
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application [illegible]
the same [illegible]
[illegible]

In the [illegible]
physicians [illegible]
section [illegible]
Circuit Court of [illegible]

Judgment affirmed.

DOVE, P. J., and SPIVEY, J., concur.

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Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

October Term, A. D. 1957

15 I.A. 2d 286

General No. 10128-10129 Cons. Agenda No. 8

B. H. Moore, Board of Education of Community Unit School District No. 200 of the County of Menard and State of Illinois, Henry Deverman, Victor McAtee, Homer Deverman, Glen Baker, John Strums, Bob Tice and John Sachtleben, Jr., individually and as members of the Board of Education of said School District,

Plaintiffs-Appellants,

vs.

County Board of School Trustees of Logan County, Illinois, an Administrative Agency, Mrs. Vera M. Armintrout, Merle D. Armintrout, Board of Education of Community Consolidated School District No. 183 of the Counties of Logan and Menard, State of Illinois, and Community High School District No. 408 of Logan and Menard Counties, Illinois,

Defendants-Appellees.

Appeal from the Circuit Court of Logan County

CARROLL, P. J.

Plaintiffs appeal from two separate judgments of the Circuit Court of Logan County which affirmed administrative decisions of the Board of School Trustees for said county in detachment and annexation proceedings conducted under the authority of Art. 4B of the School Code. (Ill. Rev. Stat. 1953, Chap. 122, Art. 4B).

On the theory that the constitutionality of a statute is involved, the appeals were directed to the Supreme Court and were there consolidated for review. Upon determining that the record presented no debatable constitutional question, the Supreme Court transferred the causes to this court for consideration of errors assigned other than those of a constitutional nature. (Moore v. School Trustees, 10 Ill. 2d, 320).

The initial action in these proceedings was the filing with the Board of Trustees of Logan County of two petitions praying that certain territory therein described be detached from Community Unit School District No. 200 in Menard County (which is referred to in the briefs as the Greenview District) and annexed to Middletown Community Consolidated School District No. 183 of Logan and Menard Counties, and also to Middletown Community High School District No. 408 of Logan and Menard Counties. These petitions were signed by the requisite number of legal voters residing in the territories sought to be detached and their sufficiency in that respect is not challenged. Upon the required notice being given, a hearing on both petitions was held before the County Board of School Trustees resulting in the entry of orders granting the respective prayers thereof. Thereafter plaintiffs filed complaints under the Administrative Review Act praying a review and reversal of the Board's decisions.

The Circuit Court affirmed the action of the Board of Trustees in each case and this appeal followed.

Eliminating the constitutional questions urged by plaintiffs in the Supreme Court, the remaining grounds upon which reversal is sought are: (1) that a correct map of the districts in question was not presented to the School Trustees; (2) that the petitions filed with the Board of Trustees were not sufficient and (3) that there is insufficient evidence in the record to show that the petitioners were entitled to the relief prayed.

The basis of plaintiffs' first contention is failure of the County Superintendent of Schools to comply with Sec. 4B-4 of the School Code by furnishing to the Board of Trustees a true map of the districts involved. The portion of said Section 4B-4 which is pertinent here, reads as follows: ". . . Prior to the hearing the secretary shall submit to the County Board of School Trustees maps showing the districts involved, a report of financial and educational conditions of districts involved and the probable effect of the proposed changes."

The record of proceedings before the County Board of School Trustees shows the following: "Prior to the hearing on the petition, the undersigned secretary submitted to the County Board of School Trustees a copy of the notice of the hearing

The Circuit Court affirmed the action of the Board of Trustees in each case and this appeal followed.

Plaintiffs challenge the constitutionality of the statute by plaintiffs in the Circuit Court, the trial court provided upon which reversal is sought, that: (1) such a consolidation of two districts in question was not presented to the School Trustees; (2) that the petitions filed in the Board of Trustees were not sufficient; and (3) that there is insufficient evidence in the record to show that the petitioners were qualified to the petition signed.

The basis of plaintiffs' claim concerning the failure of the County Superintendent of Schools to provide 15 days of the School Code by transmitting to the Board of Trustees a map of the districts involved. The question of said section 17-1 which is pertinent here, reads as follows: ". . . Prior to the hearing the secretary shall submit to the County Board of School Trustees maps showing the districts involved, a report of financial and educational conditions of districts involved and the probable effect of the proposed changes."

The record of proceedings before the County Board of School Trustees shows the following: "Prior to the hearing on the petition, the undersigned secretary submitted to the County Board of School Trustees a copy of the notice of the hearing

on the petition, a map showing the districts involved and financial data concerning the districts involved in the proposed boundary change". The record further indicates that the maps submitted by the secretary were made a part of the record of the proceedings of the Board. Two of these maps were included in the transcript as originally filed in the Administrative Review cases. Prior to the hearing, the Trial Court permitted the amending of the transcripts to include certain other maps which had been submitted to the Board of Trustees prior to the hearing on the petitions. In allowing the completion of the transcripts, the Trial Court was acting within its powers as conferred by the Administrative Review Act. (Sub-Par. B, Par. 1, Sec. 275, Chap. 110, Ill. Rev. Stat. 1955).

Plaintiffs' argument appears to amount to conceding that maps of the districts involved were in fact submitted to the Board of Trustees but that such action failed of compliance with the requirements of Sec. 43-4 because such maps were not correct. Plaintiffs have not seen fit to include the maps in the abstract of the record nor is there pointed out any errors or inaccuracies therein. Plaintiffs' conclusion that the maps are incorrect finds no support in the record. We are therefore of the opinion that the record shows compliance with the statutory requirements concerning the furnishing of maps.

A further contention advanced by plaintiffs is that the petitions in this case are void because it is not shown therein that the districts affected will be compact and contiguous

after the proposed change in boundaries is made. Sec. 4B-3 of the School Code provides that no petition for a change in the boundaries of an existing school district shall be granted unless the territory within any district whose boundaries are affected by the granting of the petition shall after the granting thereof be compact and contiguous. However, we find no provision in the statute that such a petition contain a recital to the effect that the districts involved will constitute a compact and contiguous territory after the granting thereof. If such a statement were included in a petition, it would in itself have no evidentiary value in establishing whether the condition imposed by the statute did in fact exist. People ex rel. v. Community Unit School District No. 201, 7 Ill. App. 2d, 32.

In the instant case, it appears that the Board of School Trustees by its order found that the territory in each district affected by the granting of the petition would, after the granting thereof, be compact and contiguous. It further appears that such finding is supported by the maps of the affected districts and other evidence in the record. Such finding must be deemed prima facia correct and since it has substantial support in the evidence, the binding effect thereof is not debatable. Oakdale Consolidated School District v. County Board, 12 Ill. App. 2d, 260.

[illegible]

Finally to be considered is plaintiffs contention that there is insufficient evidence in the record to show that the petitioners were entitled to the relief prayed. It appears from the record that the territory involved comprises about 700 acres of land and that the petitions were signed by the only legal voters residing therein. In 1947 this territory, which was then part of the Middletown High School District was included in the then newly organized Greenview District. There is no dispute as to the adequacy of the school facilities of either of the districts. Both appear to maintain schools which are recognized by the State Superintendent of Public Instruction. Due to the small amount of land involved, it is obvious that the change in boundaries will not appreciably affect the assessed valuation of either district. However, the tax income of the Middletown districts will to some extent be increased. The distance to the Greenview School from the territory is greater than to the Middletown Schools. Bus transportation for pupils is maintained by all of the districts involved. The Village of Middletown, where the schools of the annexing districts are located, appears to be the community center of the petitioners. The petitioners testified that they preferred to have their children attend the Middletown Schools. No residents of the territory involved testified in opposition to the petition.

We think this record discloses that in conducting the hearing on the evidence, the Board of Trustees fully complied

with the duty enjoined upon it by Sec. 4B-4 to hear evidence as to the school needs and conditions of the territory involved and that adjacent thereto and as to the ability of the districts affected to meet the standards of recognition as prescribed by the Superintendent of Public Instruction. Under the school law, the Board of School Trustees were empowered to change the boundaries of the schools involved to suit the convenience of the majority of the inhabitants of the territory sought to be annexed to the Middletown districts. School District No. 79, v. County Board of School Trustees, 4 Ill. 2d, 533; Oakdale Consolidated District v. County Board, supra. In exercising such power, it acts as an agency of the legislature. Pritchett v. County Board of School Trustees, 5 Ill. 2d, 356.

However, in the exercise of its administrative function, it is required to follow the standards prescribed for its guidance by the legislature. These standards require that in addition to being furnished with maps showing the districts involved and a report of financial and educational conditions of such districts, the Board shall hear evidence as to the school needs and conditions of the territory involved and that adjacent thereto.

It is thus evident that determination of the questions arising by virtue of a proposed change in the boundaries of school districts has been left to the Board of School Trustees.

This administrative body by reason of having seen the witnesses and also its familiarity with local problems involved, is far better equipped than is this court to weigh the many factors which enter into determining whether a given territory should be detached from one district and annexed to another. In this case, the County Board of School Trustees in discharging its duty, appears to have followed the standards prescribed for its guidance. Its decision is supported by sufficient evidence. In this situation, the judgment of this court will not be substituted for that of the County Board of School Trustees. The judgment of the Circuit Court of Logan County is affirmed.

Affirmed.

Reynolds and Roeth, JJ, concur

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47142

15 I.A. 2d 287

RALPH WUETIG, Appellee,	)	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	)	
GEORGE DEMENT, Commissioner of Public Works, and LLOYD JOHNSON, Commissioner of Streets and Sanitation, Appellants.	)	

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment awarding a writ of mandamus to compel the Commissioner of Streets and Sanitation of the City of Chicago to issue a permit to plaintiff for the moving of a building. The building was located on land to be used for the Calumet Skyway Toll Bridge. The city had acquired title to the property and had entered into a contract with a wrecker providing for the demolition of this building along with others owned by the city. The wrecker was given no title to the property, had no right to move or sell the building and could not grant such right to plaintiff. Notwithstanding this, the wrecker entered into a contract with plaintiff on September 18, 1956, for the sale of the building in question for $2500.

Plaintiff through a licensed house mover filed a petition dated September 21 and September 24, 1956, with the Commissioner of Public Works for permission to move the building to 8741 Luella avenue, Chicago. The permit was refused. On October 3, 1956, plaintiff filed this

suit. The matter was heard and on October 29, 1956 a writ of mandamus was issued, directing the issuance of a permit and enjoining defendants, their employees, agents and any of the departments of the city from interfering with plaintiff's moving of the house. The only basis upon which the court appears to have made this decision is derived from the following statement:

> "The court: I said all during this case on a combination of things that appealed to me, on the basis of the saving of a nice home where it wouldn't hurt the City, and other reasons, but I have no idea whether an Appellate Court would follow my line of reasoning on that or not. It isn't strictly a legal thing, and they might say we can't wander off into saving this, and saving there for economy reasons where there is a definite contract to do this that must be carried out."

The court should have taken counsel of his apprehensions.

On November 1, 1956, the parties together with the wrecker appeared before the trial court. The attorney for the wrecker informed the court that the contract with the city to demolish the building required that it be demolished that day, November 1, 1956; that the contract provided for a penalty of $100 a day for every day of default by the wrecker; that the city had not threatened the wrecker but that the wrecker did not want to default; that plaintiff had thirty days within which to remove the building under the contract between the wrecker and himself and not having done so, the wrecker was going to demolish the building. Plaintiff requested the court to enjoin the wrecker from so demolishing the building. The trial court refused unless plaintiff posted a bond, and plaintiff not offering

to do so, the court declined to enjoin the wrecker. Thereafter, the wrecker demolished the building as he was required to do under his contract.

The city says its experience has revealed that delay, confusion and financial loss have resulted when it has attempted to salvage homes by removal. For that reason, the contract provided for demolition. That decision was the business of the responsible city officials, not the court. A clear showing of right to the relief demanded must be made before courts will issue a writ of mandamus. Bengson v. City of Kewanee, 380 Ill. 244; People ex rel. Rude v. City of LaSalle, 378 Ill. 578; Hooper v. Snow, 325 Ill. 53; People ex rel. Younger v. City of Chicago, 280 Ill. 576; People ex rel. Webster v. City of Chicago, 277 Ill. 394. As we have decided the case on its merits, there is no need to consider the point made by the city that the house having been demolished, the cause has become moot.

Judgment reversed.

McCormick and Robson, JJ., concur.

47070

15 I.A.2d 288

ARNOLD A. SCHWARTZ, d/b/a ALLIED FINISHING SPECIALTIES CO., Appellee,	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	)	
LAKE VIEW TOOL & MANUFACTURING CO., a corporation, Appellant.	)	

JUDGE ROBSON DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for plaintiff in an action to recover the purchase price of goods sold and delivered to defendant. The sole question presented is whether or not plaintiff was the proper party to maintain an action for the purchase price of the goods.

The pertinent facts necessary for our decision as revealed by the testimony and exhibits are that plaintiff prior to December, 1947, was president of the Allied Finishing Specialties Co., an Illinois corporation. The forepart of December, 1947, he purchased all the assets of the corporation and thereafter conducted the business under the same name as its sole proprietor. On December 29, 1947, plaintiff as president of Allied Finishing Specialties Co. filed with the Secretary of State a statement of intent to dissolve the corporation by voluntary consent of the shareholders. On February 17, 1948, the corporation filed its annual report pursuant to Section 95 of the Business Corporation Act. (Ill. Rev. Stat. 1955, chap.

32, sec. 157.95). In May, 1948, the corporation paid its annual franchise tax. The corporation filed no annual report in 1949 and did not pay a franchise tax in that year. There is nothing in the record to indicate that further proceedings were undertaken in connection with the voluntary dissolution after the filing of the statement of intent to dissolve. On September 22, 1949, plaintiff filed a certificate in the office of the County Clerk of Cook County that he was doing business under an assumed name, i.e., "Allied Finishing Specialties Co." The corporation was dissolved by decree of court in October, 1950, as the result of a proceeding brought by the Attorney General based upon the failure of the corporation to file an annual report and pay a franchise tax in 1949.

Prior to the issuance of the decree of dissolution, beginning on September 9, 1949, the defendant transacted business with Allied Finishing Specialties Co., purchasing paint and supplies in the amount of $2,183.60, and made various payments totaling $1,481.51, and was allowed certain credits, leaving a balance due and owing as of October 19 of $732.09, for which plaintiff filed this suit.

Defendant's sole contention is that even though he received and used the merchandise he never did business with Schwartz as an individual; that he dealt only with the corporation and therefore owed plaintiff nothing for the goods. There is no question that plaintiff from

December of 1947 conducted business as an individual proprietor under the former corporate name, although not until September 22, 1949, did he register it with the county clerk. This was notice to all, including defendant, that he was doing business as an individual under the corporate name. The statement of claim indicates that the amount for which suit was filed was a part of a running account and that after September 22, 1949, defendant purchased $1,646.55 of goods from plaintiff and paid $1,330.26 on the account. It is thus apparent that a substantial part, if not all the money that defendant owed plaintiff was for purchases made after plaintiff had registered under his assumed name.

Upon the filing of the statement of the intent to dissolve, the corporation was only qualified to conduct such business as was necessary for winding up of the corporate affairs. Ill. Rev. Stat. 1955, chap. 32, sec. 157.78. As a result of the failure to complete the voluntary dissolution of the company, it was still technically in existence throughout 1948 and 1949. This, however, was not material to the issues in the instant action because plaintiff, having purchased the assets of the corporation, was personally liable for any obligations assumed of the corporation which were not connected with winding up its affairs. Ill. Rev. Stat. 1955, chap. 32, sec. 157.150. If the goods that defendant had purchased from him were not up to specification, or if defendant had suffered

damages, plaintiff would have been liable.

Plaintiff could maintain an action for goods sold and delivered under the assumed name. In Grody v. Scalone, 408 Ill. 61 (1951), it was held that under the provisions of the act pertaining to the registration and use of assumed names, Ill. Rev. Stat. 1947, chap. 96, par. 4 to 8, inclusive, an express penalty is imposed for nonobservance in the form of a fine or imprisonment. No penalty is provided for the use of an assumed name without authority which would void a contract otherwise valid. Thus the penalty expressed is exclusive and the statute does not prevent one doing business under an assumed name in violation of the Act from suing on a contract made under the assumed name. Therefore, although the corporation existed at the time of the transaction, it is immaterial because defendant cannot by a collateral attack negate the fact that plaintiff had purchased the assets of the corporation and could do business under an assumed name. In this connection it is interesting to note that there is nothing in the record to indicate that defendant ever made a tender of the balance due on the account to the corporation between the time of the last purchase in October of 1949 and June of 1950 when suit was filed. In so far as the liability of the defendant was concerned, business transacted with the Allied Finishing Specialties Co. was in fact business transacted with the plaintiff.

We conclude that defendant was liable to the

plaintiff for the goods he had received. The judgment of the trial court is affirmed.

Judgment affirmed.

Schwartz, P. J., and McCormick, J., concur.

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46983

15 I.A.2d 289

MARY FRANCES WADE, a minor, by CLEVELAND WADE, her father and next friend,	)	APPEAL FROM
Appellant,	)	SUPERIOR COURT
v.	)	COOK COUNTY.
PATRICK M. GORMAN,	)	
Appellee.	)	

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for injuries to a small child. The verdict and judgment were for defendant and plaintiff has appealed.

Mary Wade, then 6 years of age, was injured by an automobile the afternoon of November 3, 1950 on Crawford Avenue near 164th Street, extended, in Cook County, Illinois. She with other children had alighted from a northbound school bus and was crossing Crawford Avenue from east to west when defendant's southbound passenger car struck her.

At the trial plaintiff moved for a directed verdict at the close of all the evidence and after verdict moved for judgment notwithstanding. The motions were denied and plaintiff argues here that this ruling was error.

On this question we take only the evidence favorable to defendant disregarding unfavorable evidence and inferences and draw legal inferences most strongly in his favor to determine whether reasonable men could differ on the question of his negligence. Simmons v. South Shore Hospital, 340 Ill.App. 153.; Johnson v. Kirkpatrick, 11 Ill. App. 2d 214; Anderson v. Cummings, 325 Ill. App. 519. Defendant started

to slow down "immediately" when he observed the bus come to a stop. The bus started north after leaving the children off. Defendant saw two school boys cross Crawford Avenue and walk toward him on the west shoulder of the road. The bus and defendant's car passed each other about 150 feet north of the place the bus had stopped. Defendant's speed was then 20 miles per hour and he saw the children standing on the shoulder of the east side of the road. He took his foot off the gas, reducing his speed to about 14 miles per hour when he was 500 feet from the three children on the east side. When within 50 feet from them they darted across the road and he "immediately" slammed on the brakes. His car was almost completely stopped when it struck Mary Wade.

It is our opinion that on that evidence reasonable men might well differ on the question whether defefendant acted prudently under the circumstances. We think, therefore, that the court correctly denied the motions. The case was for the jury.

The next point is whether the trial court erred in denying the motion for new trial on the grounds that the verdict was against the manifest weight of the evidence and that prejudicial error was committed at the trial.

We think the verdict is against the manifest weight of the evidence. All the evidence, favorable and unfavorable, may be considered on this question. It is our view that the testimony of defendant shows clearly that the verdict should not have been for him. We need not therefore give consideration to arguments attacking the reliability of witnesses for the plaintiff.

Defendant testified the day was good and the roads dry; that when "1500 feet or better" north of the point of the accident he saw, what he knew was, a northbound school bus stopping; that he "immediately started slowing down" and observed two children cross the road and come north on the west shoulder; that his car,at 20 miles per hour, and the bus passed each other "well over" 150 feet from the point of accident; that he then saw plaintiff and her brother and sister on the east shoulder of the road "standing there talking"; that he kept watching them until he was about 50 feet away when "all three" of them "immediately darted in front of the car"; that he "immediately slammed on the brakes", and that the right front fender struck Mary Wade, the last one crossing the road.

He testified he did not blow the horn; that there was no traffic ahead of or behind him and he had the road "to himself"; that he had taken his foot off the gas when he passed the bus because he was "in doubt" whether the children might or might not cross the road; that when 50 feet from the children he was going about 14 or 15 miles per hour; that the child was at the "extreme" right corner of his car and "almost clear" when struck, and that he did not try to swerve to the left but "went in a straight line."

We think that defendant clearly had the duty to do more than take his foot off the gas when he saw the children and knew they might "possibly" cross the road. He did not blow his horn to warn of his approach; did not get his car under control by putting his foot on the brake so that he might avoid running the children down if their childish

impulses moved them to suddenly cross the road, and finally he did not try to swerve his car though no traffic was ahead or behind or coming toward him and a slight swerve would have avoided Mary Wade since she was almost clear when she was struck. Our decision is squarely supported by Stemkowski v. Patterson Co., 324 Ill. App. 318, and our recent Pope v. Rose, 14 Ill. App. 2d 106. The general rules relied on by defendant are not inconsistent with our conclusion.

The trial court erred in not granting the new trial and the cause will be remanded. We shall comment, in aid of the new trial, on the procedural points made here.

With respect to the incident in which the plaintiff's former attorney was subpoenaed by defendant in an attempt to prove that defendant did not pass a standing school bus, we assume plaintiff's amended complaint will prevent a recurrence of the incident. With respect to the claimed error in instructing the jury, we think: a) Defendant's instructions number 8 and number 22 should be supplemented by "a clear and concise" instruction telling the jury what specific negligence is charged in the complaint so that it will have a guide in determining whether the elements of plaintiff's case were proven. Signa v. Alluri, 351 Ill. App. 11. Even if we assumed the instruction was more favorable to plaintiff, we should still insist upon proper instructions. b)Defendant's instruction number 16 should be modified so as not to single out plaintiff. The jury's verdict should not be influenced

by sympathy for either party. The instruction should also be modified so as not to mislead the jury away from the consideration that drivers must foresee greater danger where children are involved.

REVERSED AND REMANDED
FOR A NEW TRIAL.

FEINBERG, J. AND LEWE, J. CONCUR.

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47071

15 I.A.2d 290

CLAIRE ABRAMS, Appellee,	)	APPEAL FROM
v.	)	SUPERIOR COURT,
GEORGE ABRAMS, Appellant.	)	COOK COUNTY.

JUDGE FEINBERG DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an adverse decree for separate maintenance, which awards the custody of four minor children to plaintiff and directs defendant to pay plaintiff, for her separate maintenance and for support of the minor children, $150 per week, and $1,000 for attorneys' fees.

As grounds for reversal defendant contends (1) that the allowance for support of plaintiff and the four children is excessive, unreasonable and arbitrary, and not based on the ability of defendant to pay; (2) that the failure of the decree to find that plaintiff was living separate and apart from defendant without her fault renders the decree fatally defective; and (3) that the allowance for attorneys' fees is without any basis in the record.

We have examined the evidence upon the subject of defendant's ability to pay. He testifies that among his items of expense is the item of $1,572.82 per year for premiums for life insurance on his life, in favor of the children. The decree does not require defendant to maintain this insurance, and it is more important that the immediate needs of plaintiff and the children be met than insurance provision for future speculative contingencies.

The item of $120 a month expended by him for rent of his apartment seems high when compared with her expenditure of $115 a month for an apartment that houses herself and the four children. There is no explanation in the record as to why he is required to pay that much rent.

With the elimination of the insurance premiums referred to and a reduction in the rent required for his housing, as well as a reduction in the expenditures for cleaning, laundry, medical and dental care for himself, the amount allowed by the decree is not, in our judgment, excessive and unreasonable. Should the circumstances of the parties change, the court is always open to them for relief.

The decree is not vulnerable to attack because of the absence of a finding therein that plaintiff was living separate and apart without her fault. The Separate Maintenance statute, Ch. 68, par. 23.2, Ill. Rev. Stat. 1955, provides:

> "The process, practice and proceedings under this Act shall be the same as is provided for in 'An Act to revise the law in relation to divorce.'"

The Divorce Act, Ch. 40, par. 7, provides:

> "The process, practice and proceedings under this Act shall be the same as in other civil cases * * *."

Hence the Civil Practice Act applies to separate maintenance actions and makes findings in a decree unnecessary. Anthony v. Gilbrath, 396 Ill. 125. The complaint charges that she is living separate and apart without her fault. The evidence supports the charge, and that is all that is required.

The decree as to attorneys' fees must be reversed, since there was no showing as to the services rendered by the attorneys, and therefore no basis upon which to make the allowance.

Accordingly, the decree is reversed and the cause remanded as to the allowance of attorneys' fees and is affirmed in all other respects. The cause is remanded for further proceedings consistent with the views herein expressed.

AFFIRMED IN PART AND REVERSED
IN PART AND REMANDED WITH
DIRECTIONS.

KILEY, P.J., AND LEWE, J., CONCUR.

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151 I.A. 2d 291

47067

JOSEPH HARTMANN, Appellant, v. MAJOR L. YOUNCE and DAETTA YOUNCE, Appellees.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

JUDGE FEINBERG DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree entered for defendants upon the pleadings only, in an action to foreclose a mechanic's lien for labor and material furnished under a contract for the installation of a warm air heating system in the premises owned by defendants.

The answer of defendants asserted two special defenses: (1) that plaintiff failed to obtain a permit for the installation of the heating system and the installation of the electrical work connected therewith, in violation of Chapter 79.1, §§3, 6, 9, 10, 13, 14 and 15, and Chapters 86 and 87 of the city ordinances; and (2) that plaintiff failed to register and obtain a license as a warm air heating contractor, as provided by §79.1-15 of the city building ordinance.

Plaintiff moved to strike, among other paragraphs of the answer, paragraph 5, which related to the failure of plaintiff to secure a permit from the city authorities for the installation of the heating system, in violation of the city ordinances. This motion was by order denied, upon condition that defendants file their bill of particulars in

support of said paragraph. Defendants filed a bill of particulars in accordance with this order, which set up specifically the facts relating to the violation of the ordinance requiring a permit. Thus the defense of the failure to obtain a permit remained an issue in the case.

A reply was filed to the answer, in which plaintiff alleged that the representatives of the Building Department of the City of Chicago inspected the equipment installed by plaintiff and directed two minor changes to be made in the installation; that said minor changes involved a cost not to exceed $50; and that plaintiff undertook to make the two changes suggested by the Building Department, but defendants denied plaintiff access to the premises and prevented plaintiff from making the minor changes.

Upon this state of the record defendants moved for judgment on the pleadings. No evidence was heard. The court entered the decree finding that plaintiff's failure to register as a contractor was in violation of the building ordinance and constituted a defense not denied by the reply.

The issue as to the failure to obtain a permit for the installation of the heating system was not passed upon by the court. The decree appealed from makes no reference to that issue.

We think that the bill of particulars, which is a part of the pleadings, and the reply filed by plaintiff presented an issue with respect to the alleged failure to obtain a permit, requiring proof. The failure alone to

register and obtain a license is not sufficient in itself to defeat a claim under a contract otherwise lawful, where the labor and material were furnished. Meissner v. Caravello, 4 Ill. App. 2d 428; Douglas Lumber Co. v. Chicago Home for Incurables, 380 Ill. 87; Grody v. Scalone, 408 Ill. 61; Cohen v. Lerman, 408 Ill. 155. This failure to obtain a license is distinguishable from City of Chicago v. Wonder Heating & Ventilating Systems, Inc., 345 Ill. 496, relied upon by defendants, which involved undisputed failure to obtain a permit, as required by the building ordinances, covering construction which involved the health, safety, welfare and comfort of the public.

We are not expressing any opinion upon the issue presented in the instant case as to whether the facts alleged constitute a permit for the installation of the heating system, since proof must be taken upon that issue.

Accordingly, the judgment is reversed and the cause remanded for further proceedings consistent with the views herein expressed.

REVERSED AND REMANDED.

KILEY, P.J., and LEWE, J., CONCUR.

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57M7

In the

APPELLATE COURT OF ILLINOIS

Fourth District

15 I.A. 2d 291

Paul Daniels,
Plaintiff-Appellee,

vs.

Ivan Dunahee,
Defendant-Appellant.

Appeal from
the Circuit Court of
Richland County,
Illinois.

Hon. B. W. Eovaldi, Judge Presiding.

* * * * * * * * * * * * * * * * * * .

Scheineman, J.

Plaintiff, Paul Daniels, recovered a judgment for $8000 upon a jury verdict, for injuries received while helping his father-in-law, the defendant, clean some seed in a combine on defendant's premises. Plaintiff came with his wife and two children to visit the wife's folks on Thanksgiving. He planned to do some hunting on defendant's farm, and to join the family for a meal. Although there is some confusion as to the nature of any invitation, it is clear from the undisputed testimony that they were all on the premises as social guests.

When plaintiff arrived the defendant and two of his sons were working on the combine cleaning seed. Plaintiff states that defendant asked him to

help, which defendant denies, but plaintiff did change his clothes and put on the boots he intended to wear while hunting. He came to the truck where defendant was dumping sacks of seed into the hopper of the combine, and defendant said for him to drag up the sacks on the truck, so that defendant would not have to turn around and fetch them. This was the only task assigned to him.

Twice the plaintiff clambered across the top of the combine where there were moving parts. On his second trip he stepped on the elevator canvas roller which turned and his foot went into a revolving cylinder and was injured.

Plaintiff was claiming the status of "invitee" under the pleadings and still claims that status, under which defendant would owe him a duty of due care. He tendered and the court gave the following instruction:

"An invitee is one who entere upon the premises of another in the interest of, or for the benefit of, the occupant or owner of such premises or in a manner of mutual interest, or in the usual course of the business of such occupant or owner, <u>or on his invitation, express or implied.</u> With respect to an invitee it is the duty of the occupant or owner to use reasonable care to keep his premises in a reasonably safe condition." (Italics supplied.)

The words in italics in the quoted instruction plainly told the jury in the disjunctive, that a person present on another's premises by invitation, express or implied, thereby had the status of invitee. Thus, it eliminated all distinction between a person present on business and one who is a mere social guest.

This is not the law. A guest has no higher status nor greater rights than a mere licensee. He cannot recover from the host for injuries, in the absence of wilfull and wanton misconduct. 28 ILP 54, Negligence Sec. 58. Guests. Krantz v. Nichols, 11 Ill.App.2d 37; Biggs v. Baer, 320 Ill.App. 597; Bartolucci vs. Falleti, 314 Ill.App. 551, Aff. 382 Ill. 168, 46 N.E.2d 980.

It is normally said that there must be some benificial interest to the owner or occupant in the visit, and that the intangible advantages which arise from social contacts are not sufficient. "A better reason for the rule is that a host merely offers his premises for the enjoyment of his guests with the same security that the host and members of family who reside with him have." 38 Am. Jur. Negligence, Sec. 117.

Appellee has contended that the status of a guest may change. With this principle we agree, and the question whether the status has changed from licensee to invitee may be submitted to the

jury under proper instructions. Here the jury were told that any invitation , express or implied, would automatically make the plaintiff an invitee. The instruction might be harmless in some circumstances, such as a customer entering a retail store, but in this case it is clear that plaintiff came as a licensee pursuant to an express or implied invitation to be a guest.

Under the evidence in this case, there could be no doubt that defendant's married daughter and her family were welcome guests, and had an invitation express or implied. Thus the jury could hardly avoid accepting the plaintiff's theory, set forth in the instruction, and thereby give the plaintiff the preferred status of invitee. Since we must hold that the case was tried on an incorrect theory and with reversible error in the instruction, the judgment is reversed and the cause remanded for a new trial.

Reversed and Remanded

Culbertson, P. J. and Bardens, J. concur.

~~Publish abstract only.~~

Gen. No. 11099 (Abstract Only) Agenda 7

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
(First Division)
OCTOBER TERM, A. D. 1957.

HAROLD RUSH and CARRIE RUSH, Plaintiffs-Appellants,	)	Appeal from the
vs.	)	Circuit Court of
THE ESTATE OF JOHN RUSH, Deceased, Defendant-Appellee.	)	Iroquois County.

SPIVEY--J.

On appeal from the County Court of Iroquois County, this cause of action was tried before a jury in the Circuit Court of Iroquois County for board, room, and care furnished the deceased John Rush during his lifetime.

At the close of all of the evidence the defendant moved for a directed verdict which was by the court allowed. No formal written verdict was returned by the jury but upon being instructed by the court to return such a verdict the jury in open court by voice vote returned a verdict for the defendant.

On the same day, November 26, 1956, the following judgment was rendered, "Pursuant to said verdict, judgment

is rendered in favor of defendants and against plaintiffs for costs." Subsequently, plaintiffs filed a motion for new trial which was denied on March 4, 1957.

Plaintiffs appeal from the judgment entered on November 26, 1956, and from the court's denial of plaintiff's motion for a new trial. No other judgments were entered.

The judgment entered and the order denying plaintiff's motion for a new trial are neither one final appealable orders. This court must on its own motion dismiss the instant appeal for lack of jurisdiction. Chicago Portrait Co. v Chicago Crayon Co., 217 Ill. 200, Anderson v. Samuelson, 340 Ill. App. 528, Pollack v. Theiss, 348 Ill. App. 594.

The judgment rendered does not purport to be in favor of either party on the merits nor does it by any of its language terminate the instant litigation, but is a judgment for costs only.

Except in some instances, not applicable here, it has been the long established rule of law in Illinois that a judgment for costs only is not a final appealable order. Duncan v. National Bank of Decatur, 285 Ill. App. 305, Town of Magnolia v. Kays, 200 Ill. App. 122, Smith v. Farmers State Bank, 392 Ill. 456, People v. Board of Education, 236 Ill. 154, and cases cited therein.

Likewise, an appeal will not lie from a verdict of a jury. Le Menager v. Northwestern Barb Wire Co., 296 Ill. App. 568, and cases cited therein.

Neither may an appeal be perfected from an order denying a motion for a new trial. Peirce v. Ott, 201 Ill. App. 46, Robson v. Pennsylvania Railroad Co., 337 Ill. App. 557, Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200.

[illegible]

Neither may an appeal be taken from an order denying a motion for a new trial. Latham v. Beck, [illegible] Ill. App. 46; Robson v. Pennsylvania Railroad Co., [illegible] Ill. App. 557; Chicago Portrait Co. v. Chicago Crayon Co., 217 Ill. 200.

The appeal will be dismissed for want of jurisdiction, at the cost of the appellant, with leave to appellant to withdraw the record.

Appeal dismissed.

Dove, P. J. and McNeal, J. Concur.

General No. 11106 Agenda No. 9

15 I.A.2d 293

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT--FIRST DIVISION

- - -

October Term, A.D., 1957

K. O. SATTERFIELD, Petitioner-Appellant, vs. FAIRFIELD DRAINAGE DISTRICT NO 2 OF FAIRFIELD TOWNSHIP, BUREAU COUNTY, Illinois; and Henry Brandau, John Buckley and John McKenzie, the Drainage Commissioners of Fairfield Drainage District No. 2 of Fairfield Township, Bureau County, Illinois, Defendants-Appellees.	Appeal from the Circuit Court of Bureau County.

DOVE, P.J.

On August 8, 1956, K. O. Satterfield filed his verified petition in the Circuit Court of Bureau County against Fairfield Drainage District No. 2 and its commissioners, praying that a writ of mandamus issue directing the defendants to clean out its main ditch and one of the laterals in accordance with the recommendations of an engineering company dated March, 1957. The petition also prayed, in the event sufficient funds were not available to the commissioners to enable them to comply with its order, that then the defendants be directed to raise such funds by an assessment against the lands of the drainage district.

The defendants answered admitting some of the allegations of the petition and denying others. The issues thus made by the pleadings were submitted to the court for determination. ~~And the record discloses that~~ On March 21, 1957, immediately following the conclusion of the hearing of the testimony offered, the report of trial proceedings discloses that the trial judge then said that he did not feel that closing arguments were necessary; that the hearing had taken several days; that quite a number of witnesses had testified, and that the court had listened very carefully to the evidence and felt that he knew what the case was about and that he could give his decision without further argument. The court then announced that he was finding the issues for the defendants and that the petition for a writ of mandamus was denied.

The decision so announced by the court was expanded by the clerk and appears on page 29 of the record on appeal and, omitting the date of March 21, 1957, and the title of the cause, is as follows: "And now on this day hearing having been concluded in the above entitled cause and the court having considered the evidence, both oral and documentary, having listened to the arguments of counsel and now being fully advised in the premises finds that the matters and things as alleged in the petition herein fail to warrant the issuing of a writ of mandamus. It is therefore ordered that the writ of mandamus as prayed in the above entitled cause be and the same is hereby denied."

On May 17, 1957, the plaintiff filed his notice of appeal which recited that he appealed to this court from the

order or judgment entered on March 21, 1957, "denying the petition of the plaintiff for a writ of mandamus."

An abstract of record and briefs of the respective parties have been filed according to our Rules, and on October 3 this cause was reached for oral argument in this court. Counsel for appellees did not appear, but during the course of the argument by counsel on behalf of appellant this court, in examining the record, discovered that no final judgment had been entered by the trial court and suggested to counsel that perhaps the court would be compelled to dismiss the appeal.

Mandamus is an action at law and is governed by the same rules of pleading applicable to law actions (Dement v. Rokker, 126 Ill. 174, 190; People v. Western Life Indemnity Co., 261 Ill. 513,514), and the statute provides that if judgment is given for defendant, he shall recover his costs. (Ill. Rev. Stat., chap. 87, sec. 5.)

In People v. Board of Education, 236 Ill. 154, certain taxpayers filed their second amended petition for a writ of mandamus against a board of education directing it to cause the teachers of the district to discontinue the practice of reading passages from the King James version of the Bible in the schoolrooms of the district. The defendants filed a demurrer to the petition, and upon the hearing the trial court entered an order sustaining the demurrer and reciting that "the petitioners jointly and severally except to the ruling of the court on said demurrer and abide by their second amended petition and decline to plead further, and it is further considered and adjudged by the court that the defendant have and recover of the relators their costs by them in this behalf expended."

In dismissing this appeal, the Supreme Court said (P. 156): "Under our statute mandamus is an ordinary action at law and is governed by the same rules of pleading as are applicable to any other actions at law. (Dement v. Rokker, 126 Ill. 174; People v. Grabb, 156 id. 15[illegible].) This court, in Chicago Portrait Co. v. Crayon Co. 217 Ill. 200, discussing a judgment order almost in the identical language of that here under consideration, held that it was not final, and that the statute only authorized appeals from final judgments, and said (p.201): 'The circuit court merely sustained a demurrer to the declaration, and neither adjudged that the plaintiff take nothing by the writ or that the defendant go hence without day, and the judgment contained no words of equivalent meaning. There was no trial of any issue resulting in a finding for the defendant, as there was no issue to be tried and there was nothing in the nature of a determination of the rights of the parties. Such a judgment is not final.' As was said by this court in Wenom v. Possick, 213 Ill. 70, the question here is not whether final judgment should have been entered against the defendant, but whether it was so entered. These decisions are conclusive on the questions here raised. We held in both of them that a final judgment for costs against the losing party was not a final determination of the cause. See, also, on this point, Larkins v. Terminal Railroad Ass. 221 Ill. 428, and Sullivan v. People, 224 id. 468."

In Chicago Portrait Co. v. Crayon Co., 217 Ill. 200, the trial court sustained a demurrer to the declaration, and plaintiff elected to stand by the declaration. The recital of these facts in the record was followed by this judgment: "Therefore it is considered by the court that the defendant do have and recover of and from the plaintiff its costs and charges in this behalf expended and have execution therefor." An appeal was prosecuted to the Appellate Court, and that court called attention to the fact that the judgment was not final but treated it as final and disposed of the case on its merits. In reversing the judgment of the Appellate Court and remanding the cause to that court with directions to dismiss the appeal, the Supreme Court said (pp. 201-202): "The judgment was not final and the statute only authorizes appeals from final judgments. The circuit court merely sustained a demurrer to the declaration, and neither adjudged that the plaintiff take nothing by the writ or that the defendant go hence without day, and the judgment contained no words of equivalent meaning. There was no trial of any issue resulting in a finding for the defendant, as there was no issue to be tried and there was nothing in the nature of a determination of the rights of the parties. Such a judgment is not final. . . . In this case the Appellate Court had no jurisdiction of the subject matter, not being authorized by law to hear or consider an appeal from a judgment which is not final, and appellant is not legally estopped to set up a want of jurisdiction. A court finding it has no jurisdiction of a cause should dismiss it of its own motion, and the Appellate Court should have dismissed the appeal at appellant's cost.

Appellant having taken an appeal where by law no appeal would lie, will not be permitted to recover costs but will be required to pay all costs occasioned by such appeal."

People v. C. B. and Q. R.R. Co., 306 Ill. 166, was an application by the county collector of Du Page County for judgment against the property of appellant for delinquent taxes. The record disclosed that objections to certain taxes were overruled and then continued: "Exception by objector. Judgment entered. Objector prays an appeal. . . ." In the course of its opinion dismissing the appeal, the Supreme Court said (p. 167): "This is not a judgment in favor of anyone against the lots in question. The judgment should be against the lots and lands returned delinquent and in favor of the People of the State of Illinois for the amount of taxes, interest, penalties and costs. . . . . It has frequently been held that the judgment entered must be in substantial compliance with the statute. (People v. Glick, 282 Ill. 195). The entry we have quoted above is no more than a mere memorandum by the judge from which a formal judgment might be written. It is necessary that there should be an entry of record containing the essential elements of a judgment."

LeMenager v. Northwestern Barb Wire Co., 296 Ill. App. 568, was an action to recover commissions for procuring a loan, and the jury returned a verdict in favor of the plaintiff. The defendant filed a motion for judgment non obstante veredicto, and the record disclosed this order: "This cause now comes on for hearing upon defendant's motion for judgment non obstante veredicto, heretofore filed on November 7, A.D. 1936, and the court having heard said motion, and the arguments and suggestions

of counsel in relation thereto, and being now fully advised in the premises, denies said motion for judgment non obstante veredicto. Whereupon the defendant herein by its counsel, prays an appeal . . . .' In dismissing the appeal for want of a final judgment, this court stated that an appeal from a verdict of a jury would not lie, citing Harrison v. Singleton, 2 Scam. 21, and other cases, and held that until the judgment was entered upon the verdict there was no legal determination of the case.

In Krauss v. Mutual Mdse. Co., 336 Ill. App. 358, it appeared that the plaintiff recovered a judgment against the defendants, and the defendants filed a motion to vacate the same. Plaintiff filed a motion to deny defendants' motion to vacate, and the court entered an order overruling that motion and the plaintiff appealed. The Appellate Court held that such an order was not an appealable one and dismissed the appeal.

In Tocco v. Yates, 346 Ill. App. 305, this court held that an order signed by the trial judge and filed with the clerk stating that the action was dismissed but which was never expanded by the clerk was not a final judgment and dismissed the appeal.

In Carey v. National Tea Co., 351 Ill. 569, this court dismissed the appeal from an order of the trial court which granted defendant's motion for judgment notwithstanding the verdict. It was held that such an order was not a judgment but merely a ruling that defendant was entitled to a judgment.

Duncan v. Nat'l Bank of Decatur, 265 Ill. App. 305, was an action to recover the balance plaintiff claimed he had on deposit in defendant's bank. The defendant answered, and the issues made by the pleadings were submitted to the court for determination resulting in an order taking the case under advisement. Thereafter the court disposed of the case and the judgment entered was as follows: "Parties appear by attorneys, and this cause having been heard at a former term of this court, and taken under advisement, and the Court being now well and sufficiently advised in the premises, enters his finding herein for and in favor of defendant National Bank of Decatur, a corporation, and against plaintiff, J. T. Duncan, for costs. It is therefore, ordered and adjudged by the Court that said defendant, National Bank of Decatur, a corporation, do have and recover of and from plaintiff, J. R. Duncan, the costs incurred herein, and that it have execution therefor." In holding that this was not a final judgment, the Appellate Court said (p.310): "It has been repeatedly held in this State that a judgment for costs only is not a proper judgment and from which an appeal will lie. Town of Magnolia v. Kays, 200 Ill. App. 122. A proper judgment order would have been as follows: 'Therefore, it is considered by the Court that the plaintiff take nothing by his suit and that the defendant go hence without day and that the defendant do have and recover of, and from the plaintiff his costs and charges, in this behalf expended and have execution therefor.'"

In City of Alton v. Heidrick, 248 Ill. 76, the court cited (p. 80) Wells v. Hogan, Breese, 337, to the effect that

no particular form is required in proceedings of a court in order to constitute them a judgment, still it is necessary that there should be an entry containing the essential elements of a judgment. In Wenom v. Fossick, 213 Ill. 70, at page 71, the court said a final judgment "should, according to the authorities have contained a statement that 'it is considered by the court that the plaintiff take nothing by her writ and that the defendant go hence without day' or other words of similar import, disposing of the entire subject matter of the litigation."

A final judgment for the defendant in all forms of action according to Bouvier's Law Dictionary (Baldwin's Century Edition, p. 610) is in these words: "Therefore it is considered that the said AB take nothing by his writ. . . . and that the said CD do go thereof without day and it is further considered ------ Then follows the award of costs and of execution therefor."

All the instant record shows is that "the writ of mandamus as prayed be and the same is hereby denied." this is not, according to the authorities, a final judgment. Certainly it does not contain the essential elements of a final judgment, and, therefore, the appeal must be dismissed.

Appeal dismissed.

McNEAL, J., concurs.

SPIVEY, J., concurs.

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47197

15 I.A. 2d 375

SIDNEY LERMAN, doing business as BELL SALES COMPANY, Appellee,	)	APPEAL FROM
v.	)	CIRCUIT COURT
LAWRENCE MATURO, also known as LAWRENCE MATURO, SR., Appellant.	)	COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Sidney Lerman filed his amended complaint against Lawrence Maturo alleging that during June and July, 1955, he was engaged in the business of selling carnival and like merchandise; that defendant, as agent, arranged for plaintiff to sell to American Legion Post No. 80 of Whiting, Indiana, merchandise for its carnival which was to run from June 28, 1953, through July 5, 1953, the defendant to be paid or credited with commissions on the sale; that plaintiff sold and delivered to Post No. 80 on credit terms merchandise in the sum of $4,248.98, after crediting defendant with his commissions; that Post No. 80 was billed for the merchandise "of which defendant was fully aware"; that falsely representing that such monies were due him, defendant collected the amount from the Post on or about July 20, 1953, wilfully and maliciously converted the amount to his own use; and that notwithstanding repeated demands, failed and refused to pay the plaintiff. Plaintiff asks judgment for $4,248.98, with interest from July 20, 1953, plus "punitive damages and attorneys' fees." Plaintiff filed a motion for a summary

judgment and defendant filed a counteraffidavit in opposition. On November 20, 1956, the court denied plaintiff's motion for a summary judgment. On November 27, 1956, plaintiff filed a motion to strike the third amended answer of the defendant and for judgment. On that day the court entered an order denying defendant's motion to have his counter-affidavit stand as an answer, struck the third amended answer and entered judgment against the defendant for $4,461.48, to reverse which he appeals.

In our opinion there was an abuse of discretion by the trial judge in refusing to allow the defendant's counteraffidavit theretofore filed to stand as an amended answer. In denying plaintiff's motion for a summary judgment a week previously the court necessarily decided that the opposing affidavit filed by the defendant presented factual issues to be determined on a trial. The counteraffidavit set out that in the oral agreement for the joint venture the parties agreed that profits and losses would be shared equally; that on or about July 6, 1953, the defendant claimed plaintiff was indebted to defendant by reason of the Legion Carnival deficit and their other business dealings in excess of $4,600; that with the knowledge of plaintiff the defendant received and accepted the sum of money in controversy as and for settlement of his claim; that thereafter plaintiff filed a suit in the Municipal Court of Chicago, 53 M 3310, the subject matter of which relates to, arises out of and is interconnected with "the aforesaid

dealings of the parties hereinabove set forth and is not divisible; that on or about June 6, 1955, with full knowledge of all facts plaintiff and affiant [defendant] had an accounting and settled and compromised their differences once and for all times and did in that cause release and waive their respective claims against the other."

The counteraffidavit further stated: "That affiant at no time was a sales agent, servant or employee of plaintiff, nor did he ever receive any money as and for a sales commission. Affiant does acknowledge receipt of money credits by way of settlement and compromise in cause 53 M 3310, which were and are fees consistent with the custom, usage and practice in carnival business during 1953. Affiant states he made no false representations to either plaintiff or American Legion Post No. 80 and that he did not wilfully and maliciously convert the money in controversy." Attached to plaintiff's motion for a summary judgment filed March 15, 1956, is a copy of a letter dated June 6, 1955, from the attorney for the plaintiff addressed to and approved by the then attorney for the defendant, purporting to set out all the items included in the settlement reached that day between the parties while before the judge to whom Municipal Court case 53 M 3310 was assigned. Defendant maintains that the letter of June 6, 1955, supports his assertion of a release of plaintiff's claim. Plaintiff maintains that the alleged release was in fact a statement of settlement of accounts having nothing to do with the case at bar.

We are of the opinion that the counteraffidavit of the defendant filed October 24, 1956, presented issues of fact which should be resolved on a trial of the case. We think that the trial judge was correct in denying plaintiff's motion for a summary judgment and that he erred in refusing to allow the defendant's counteraffidavit to stand as an answer. The judgment of the Circuit Court of Cook County is reversed and the cause is remanded with directions to allow the defendant to file an amended answer and for further proceedings consistent with the views expressed.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

FRIEND, J., and BRYANT, J., CONCUR.

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47147

15 I.A. 2d 376

FRANK FLORIO, Appellant,	)	APPEAL FROM
v.	)	SUPERIOR COURT,
THERESA FLORIO, Appellee.	)	COOK COUNTY.

JUDGE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff Frank Florio filed suit for divorce on the ground of desertion. The defendant Theresa Florio brought a counterclaim for separate maintenance. Pursuant to hearing, a decree was entered dismissing the complaint for want of equity and allowing the counterclaim of separate maintenance, awarding defendant $25.00 per week for support and $250.00 attorneys' fees, from all of which plaintiff appeals.

Prior to the instant proceeding defendant had, on November 16, 1954, brought suit for separate maintenance. On April 15, 1955 that suit was dismissed for want of prosecution. On April 19, 1956 plaintiff filed the instant complaint, charging desertion. Shortly before the suit came on for hearing, defendant, by way of counterclaim, interposed her second suit for separate maintenance. The parties were married May 24, 1952, when plaintiff was about sixty-five years old and defendant considerably younger. No children were born of the marriage, but both parties had been married before, and defendant had two sons and a daughter by previous marriages. Plaintiff and defendant lived together harmoniously for

about a year following their marriage, but thereafter differences occurred which led to their separation. One serious dispute between the parties arose as a consequence of defendant's request that plaintiff evict a niece and her family residing in the building owned by plaintiff in order to make it possible for the wife's daughter to move into the apartment. Apparently this problem was adjusted by the husband's loaning the wife's daughter the sum of $1500.00 to be applied toward the purchase of a home.

Defendant left the family home on November 9, 1954, taking with her items of personal property which her son helped her to carry. She had not been feeling well, and her doctor recommended surgery. Plaintiff had made arrangements with the family physician for defendant's admission to a hospital in Oak Park, but she, without so informing plaintiff, entered a Chicago hospital instead. When plaintiff learned where she was under treatment he visited her and brought her flowers. With reference to defendant's status, the hospital records listed her as "separated," presumably from information supplied by her. When defendant was discharged from the hospital on November 16, 1954 she went to her daughter's home, and on that same day she filed her first suit for separate maintenance.

The basis of defendant's counterclaim, which was filed September 12, 1956 and which is substantially the same as her original separate maintenance complaint, appears in paragraph 4 and reads as follows: "That since on or about

January 1, 1954, the Cross-Defendant has become abusive toward the Cross-Plaintiff by the use of vile and opprobrious language; that he has been drinking heavily and that on or about November 1, 1954, while intoxicated, pushed the Cross-Plaintiff against a wall causing her pain and suffering; that he has refused to permit her to see members of her family and refuses to let her go out of their home when he is home; that he continuously told the Cross-Plaintiff to leave the house; that he has continuously ordered the Cross-Plaintiff to leave the house with the result that life with said Cross-Defendant became intolerable to the Cross-Plaintiff and she was forced to withdraw from her home and is living separate and apart from the said Cross-Defendant, wholly without her fault."

The evidence is undisputed that defendant left the home of the parties on November 9, 1954. One of the reasons assigned by her for leaving her husband was that he drank too much. She testified that he was drunk most of the time. This evidence is uncorroborated by any of the witnesses. Plaintiff admits that he took wine with his meals but denies that he drank to excess, and several witnesses who had visited the parties in their home stated that they had never seen him intoxicated.

The second reason assigned for leaving was that plaintiff was cruel to her. She testified that he almost threw her downstairs, that he struck her with the back of his hand and pushed her, but on cross-examination she contradicted herself. Her testimony reads: "As to whether my husband struck, he strike me, I know. . . . We just had

words two or three times. I got away before he could strike me." On direct examination she stated that "he treated me all right." According to defendant's testimony, one of the alleged acts of cruelty occurred at a party at which there were several guests, but no one of them was called as a supporting witness. There is, as a matter of fact, no corroboration of any of the alleged acts of cruelty.

A third ground alleged for leaving was that they had frequent arguments which made her life miserable. She testified that they swore at each other, and plaintiff's nephew, who lived in the same building, said that he had heard arguments for about six months before defendant left plaintiff. The record is not clear as to who provoked these arguments.

Under the authorities in this state incidents of this character are not sufficient to justify a wife in leaving her husband. In Augenstein v. Augenstein, 275 Ill. App. 18, defendant testified that there was constant arguing, that his wife had told him "to get out," and that ultimately he "couldn't stand it any longer and . . . picked up and left." Under such circumstances the court found that defendant deserted plaintiff "without her fault," and held that there was not sufficient ground for separation. In Hellrung v. Hellrung, 321 Ill. App. 333, the court stated: "It has been held repeatedly in Illinois that incompatibility of disposition, slight moral obliquities, occasional exhibits of passion, trivial difficulties, are not good cause for living separate and apart. [Citing cases.] Good cause for living separate and apart from her husband must be such conduct on

the part of the husband as will directly endanger the life of the wife, her health or person, or such a course of conduct as will necessarily and inevitably render her life miserable and living with him as his wife unendurable. [Citing cases.]" In Webber v. Webber, 349 Ill. App. 154, the court held that to justify a husband in leaving his wife because of threats, the words used must be said under circumstances which will induce the belief in the mind of a reasonable person that there was imminent danger the threat would be carried out.

Upon an examination of the record it appears that the alleged acts of cruelty in the case at bar could, at most, be classified as nothing more than slight acts of violence. In Coolidge v. Coolidge, 4 Ill. App. 2d 205, we held, upon the authority of several Illinois cases, that slight acts of violence were not the type of cruelty contemplated by the statute, and that in order to support the charge of desertion by a spouse who physically leaves the home "the 'reasonable cause' that justifies the departing spouse in leaving must be such that it would of itself entitle the party abandoning the home to a divorce." In that case it was also held that where both the husband and the wife contributed to the discord which resulted in separation the wife was not entitled to divorce on the ground of constructive desertion by the husband. In this proceeding defendant's testimony on direct examination that "he treated me all right" and the lack of corroboration of any of the alleged acts of cruelty do not support the charges of her complaint.

The remaining question is whether defendant made any bona fide attempts to return to her husband. She claims that in November of 1954, when she tried to enter his house after leaving the hospital, no one answered the door or the telephone; but it may well be that plaintiff was absent at the time. Moreover, defendant's testimony is at variance with her action; it was on the same day that she was discharged from the hospital that she filed her first separate maintenance suit--conduct which is inconsistent with her testimony that she desired to return home. In November of 1954 defendant had plaintiff arrested because she wanted her clothes; plaintiff testified that she had him arrested some time in July of 1955, and his testimony suggests that she was again interested in reclaiming her clothes, as well as some household furnishings. Whatever defendant's reasons, her recourse to police harassment does not indicate any desire on her part for a reconciliation with her husband. The cases in this State are in accord that the element of good faith is controlling in matters of this kind. In Thomas v. Thomas, 152 Ill. 577, a separate maintenance case, the court held that a wife, voluntarily quitting her husband's house without cause, must in good faith offer to return, and be refused, before her living apart will be "without her fault"; and, relative to the circumstances of that case, added that the wife cannot, if the husband is willing to receive her, stand upon a mere sentiment as to the manner of getting back, but must make a direct offer to return. In Jenkins v. Jenkins, 104 Ill. 134, likewise a separate

maintenance suit, plaintiff asked separate support on the ground that she was living separate from her husband without her fault. For twelve years she had subjected her husband to vexatious suits on groundless charges of extreme cruelty and adultery, and while one such suit was still pending she, in company with friends, went without notice to her husband's home and entered it in his absence. On returning home he was very much surprised to find it occupied and ordered her and her friends to leave; she asked for her supper, a request which her husband refused; she attempted to enter a bedroom with a traveling bag in her hand, which he forbade her to do; and he finally told her she could not stay in the house that night. The court said: "The circumstances of this visit to the house of her husband excite strongly the suspicion that what she sought was not a home in the house of her husband, where she might live as a dutiful wife, but rather evidence of a refusal on his part of shelter, so that she might institute a suit for separate maintenance. . . . After such a history [she had been, as the court put it, "at war with her husband for twelve years"]she should at least have distinctly told her husband that she proposed to abandon the war and to live in peace, and she should, to put him in fault, and before she could have adequate excuse for separate living, have given him the opportunity of considering her proposition to return, so that he might, as he had a right to do, determine what room or rooms she should take." The court remanded the cause, with directions that plaintiff's bill for separate maintenance be dismissed. In the case

before us, defendant has twice had plaintiff subected to arrest. After defendant's discharge from the hospital, plaintiff testified that defendant said she wanted to come home, but with the understanding that "you've [plaintiff] got to do what I say." And not only was defendant's offer to return home coupled with her demand that she run the household; it appeared to plaintiff that the offer was not made in good faith--"She was suing me on the court, so why did I want her to come home," he reasoned.

After a careful examination of the evidence, we have reached the conclusion that defendant failed to support the charges she made against plaintiff; he does not appear to have drunk to excess; she failed to corroborate any of the alleged acts of cruelty toward her--indeed, she even conceded on direct examination that plaintiff treated her "all right"; and there is no clear evidence that plaintiff provoked the arguments--on the contrary, they appear to have been spontaneous and mutual occurrences. On the other hand, it is an established fact that defendant left plaintiff; and it does not appear that her offers to return were made in good faith and for the purpose of reconciliation.

It follows, as we view the record, that defendant's charge that she was driven from the home by her husband and therefore entitled to live separate and apart without fault on her part is clearly against the manifest weight of the evidence; rather, it appears that she was guilty of desertion which existed for more than a year prior to the institution

of plaintiff's suit for divorce. The court should have entered a decree for divorce and dismissed the counterclaim for separate maintenance. Defendant was, however, entitled to reasonable fees for defending plaintiff's suit and prosecuting her counterclaim, and we think the award of $250.00 as attorneys' fees was reasonable and should stand. The separate maintenance decree is reversed, and the cause remanded with directions to enter a decree in favor of plaintiff for divorce on grounds of desertion, and to dismiss the counterclaim.

DECREE AFFIRMED IN PART AND
REVERSED IN PART, AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P.J. AND BRYANT, J. CONCUR.

47103

15 I.A. 2d 377

ALICE JONKMAN, Appellant, v. GEORGE SINGLETARY, Appellee.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

JUDGE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for personal injuries sustained by her as a pedestrian while crossing Highway No. 6 about midblock between Cottage Grove and South Park Avenues in the Village of South Holland, Illinois, at approximately 10:45 p.m. on June 6, 1954. The trial court denied defendant's motion for a directed verdict at the close of all the evidence, and the cause was submitted to a jury on the issues of negligence and contributory negligence. Subsequently, on June 8, 1955, the jury returned a general verdict of not guilty. Plaintiff then filed a motion for a new trial, which was allowed on July 1, 1955, the court stating that it was granting the motion because the verdict was against the manifest weight of the evidence. Defendant's petition for leave to appeal from that order was granted by this court on November 2, 1955. The first appeal resulted in reversal of the new-trial order, and a remandment of the cause with directions to proceed in due course (Jonkman v. Singletary, 10 Ill. App. 2d 335 (Abst.)). Mandate issued on June 28, 1956, and on July 13, 1956 the trial court, pursuant to mandate, vacated its order granting a new trial; at the same time the court allowed defendant's

motion to re-instate the original verdict and to enter judgment upon the verdict. Plaintiff appeals from this second judgment. It is conceded that the issues in the original appeal and in this appeal are the same; no new evidence was adduced, no new issues were raised.

This matter comes before us a second time in conformity with the provisions of Section 77 of the Civil Practice Act (Ill. Rev. Stat. 1955, ch. 110, par. 75 (2) (c))concerning appeals from orders granting a new trial. In Kavanaugh v. Washburn, 387 Ill. 204,it was held that on appeal to the Appellate Court from an order granting a new trial the only matter open for review is the propriety of the trial court's order allowing a new trial, and that the Appellate Court cannot undertake to determine the rights of the parties on the merits, but, rather, its order must be limited to an affirmance or a reversal of the order of the trial court; and in either event the cause should be remanded with directions to proceed in due course. As a result of this conclusion the Supreme Court held that "when the cause is redocketed on an order of reversal and remandment, it should leave the parties in the same position as they were before the trial court ordered a new trial. The rights of the parties as to other motions or other appropriate action that may follow the overruling of a motion for a new trial should not be foreclosed." Accordingly, we are required by this second appeal to examine and consider the identical evidence and the identical record presented on the original trial. Although

the salient facts are fully stated in our former opinion, we repeat them here as a matter of convenience for an understanding of the issues involved:

"The accident occurred shortly before 11:00 p.m. on Sunday, June 6, 1954. Earlier in the evening plaintiff and her husband, John Jonkman, and their son, Jacob, and his wife, Ann, visited the Couwenhovens, Ann's parents, who resided at 449 East 162nd Street, or Highway No. 6 (now known as 159th Street), in the village of South Holland. Their home, on the south side of the highway, was between Cottage Grove Avenue, which was some 2000 feet east of the house, and South Park Avenue, some 500 feet to the west. At that time Highway No, 6 consisted of two concrete lanes, one for each direction of travel, and was in the process of being widened to four lanes. The second westbound lane on the north side of the highway was not yet laid, and the second eastbound lane was not yet in use. Construction of the south or second eastbound lane had begun near Chicago Road and continued east to the Couwenhoven home, where it tapered to the old concrete near the east driveway of the Couwenhoven house. On the fresh concrete to the east of the taper there were some lighted pot-flares and horses, or barricades, about a half block away. Before the road widening construction had started, the speed limit posted about a mile east of the Couwenhoven house was thirty-five miles per hour, but due to the construction work it had been reduced to twenty-five miles per hour. The only illumination anywhere near the place of the accident was an overhanging light about 100 feet

east of the Couwenhoven house. It was a warm evening, and the road was dry.

"The Jonkmans arrived at the Couwenhoven residence about eight-thirty in the evening. The son parked his car on the north side of the highway, twenty-five feet west of the house, and the father parked his car just west of his son's. They had all visited the Couwenhovens on prior occasions and were familiar with the area. They left about 10:45 p.m. Plaintiff and her husband walked down the front-porch stairs to the highway, while the son waited at the foot of the stairs for his wife, who had paused to talk to her mother.

"Plaintiff testified that when she and her husband got to the highway they walked about five to seven feet west and then stopped, looked to the east and to the west, and saw the headlights of an east- and also a westbound automobile (defendant's) which were about a block away in either direction; that after stopping and looking, they started across the highway from the south, going in a northwesterly line to reach their parked car, looking straight ahead, and that they did not again look in either direction or again see the westbound car which struck them. Plaintiff said that in crossing the highway they 'hurried across' and were 'walking fast'; that her husband, who had hold of her right hand, admonished her not to lag behind. She did not know how far she and her husband had crossed the highway in a northwesterly direction when they came in contact with defendant's westbound automobile.

"Plaintiff's son, Jacob Jonkman, testified that after his wife finished talking to her mother and joined him at the foot of the porch stairs, they walked north toward the highway, behind his parents, who were about twenty-five feet ahead; that as they kept on walking, he saw the headlights of a westbound automobile (defendant's), which was about 400 to 500 feet to the east when he first saw it; that his parents were just approaching the highway at that time and started to walk northwest across the highway, his father holding his mother's hand; that there was nothing unusual about the movement of the westbound car, the speed of which he was unable to estimate; that he did not know how far his parents had crossed at the time of the impact; and that after the occurrence of the accident, an eastbound car came to a stop directly in front of where his mother was lying on the pavement.

"Ann Jonkman, plaintiff's daughter-in-law, stated that after she joined her husband at the foot of the porch stairs they proceeded north toward the highway; that about the time her mother- and father-in-law reached the edge of the highway she saw defendant's westbound car about 400 to 500 feet away; that she continued to look in that direction but had no opportunity to form an opinion as to the speed of the automobile, although later she estimated the speed at between forty to fifty miles per hour, or possibly less. In crossing the highway Mr. Jonkman took his wife's hand, and the two hurried across in a northwesterly direction, 'walking fast...at a pretty good clip'; that at the time of impact it seemed to her as if the couple were in the center of the north lane and still walking fast.

"Wendel Flint, president of the Mid-States Trailer Transport Company, was driving his automobile in an easterly direction in the eastbound lane. He testified that he had started his car from the stop light at South Park Avenue and was going twenty to twenty-five miles per hour prior to the accident; that it was very dark there (as all the witnesses agreed), and that he did not pick the people up in his headlights until they were about seventy-five to a hundred feet away; that it was so very dark that they appeared to be a blur, and that he could not tell if they were a man and a woman until after the accident; that it definitely looked to him as if the people were running north ahead of his automobile, and that he had to make a quick stop to avoid hitting them; that the westbound car was approximately half the length of the courtroom from the people when they ran in front of it; that there was no car in front of the westbound automobile which struck them, but that there were some cars parked on the north side of the highway; that in his opinion the westbound car which struck plaintiff and her husband was not going very fast; that the Jonkmans were a little better than half-way across the highway when they were hit; that after the accident Mrs. Jonkman was lying at the right front wheel of his car, and that Mr. Jonkman (who died as a result of the accident) was behind the left rear wheel.

"Helen Kettle, who was in the front seat of Flint's car, testified that when she first saw the Jonkmans they were

walking west, to the right and several car-lengths ahead of the automobile in which she was riding; that the next moment one of them seemed to clutch the other, and they made a dash across the highway, darting in front of the car in which she was riding; that it was very dark at the scene of the accident, and that the Jonkmans ran across the highway from the south to the northwest, and that defendant's car, which came in contact with them, was a little more than a car-length, or about twenty to twenty-two feet, away from them; that the driver of the car in which she was riding jammed on his brakes and came to a stop; that the Jonkmans were a few feet past or north of the middle of the highway of the westbound lane when they were struck; that the westbound car (defendant's) was going about as fast as the car in which she was riding.

"George Singletary, the defendant, testified that he was employed by the Texas Company as a gauger. He had worked until about 4:00 p.m. of the day of the accident. The Texas Company was located in Lockport, Illinois, where defendant resided. After work, he went to his home, where he remained until about 7:30 or 8:00 p.m., when he and his wife went to his mother's home, about three blocks away. Thereafter they left for the Lansing Sportman's Club. On the way they stopped for a short time to call on a friend and arrived at the club between 9:15 and 9;30 p.m., that they each had a highball at the club and left shortly after ten o'clock. Lansing is about eight to ten miles

east of South Holland. Lockport is approximately forty miles east of Lansing. After leaving the club, defendant drove his 1951 Buick west on Highway No, 6 from the Calumet Expressway, which was about two miles east of the Couwenhoven house. His automobile was in good condition, and new brakes had been installed about three or four months before the accident. As he entered Highway No, 6 from the expressway there were other cars ahead of him which either turned off or pulled away; that as he approached the Couwenhoven house there was one eastbound car coming, but no westbound cars ahead of his automobile; that he was traveling between thirty to forty miles an hour, and that his driving lights were on; that when he first saw the Jonkmans they were in front of his car, about twenty to thirty feet away; that the accident happened so fast he could not say whether they were walking or running; that the eastbound car (Flint's) was about a hundred to a hundred and fifty feet, or half a block, away at that time; that when he saw the Jonkmans twenty to thirty feet ahead he applied his brakes hard; that plaintiff and her husband were just across the center line of the highway, or maybe three-fourths of the way across from the south side of the road at the time of impact, and there was no time to turn the skidding car in any direction. The impact took place at the left front end of his car which moved about three car-lengths after the impact; that plaintiff's husband was found lying at the left front side of his automobile, and plaintiff about three car-lengths to the rear thereof;

that the eaatbound car (Flint's) came to a stop alongside of or about three to five feet away from plaintiff.

"Esther Singletary, defendant's wife, stated that she rode in the front seat alongside her husband; that they were not in any particular hurry and were driving at a moderate rate of speed; that prior to the impact she saw only a man, and he was running north in front of the car about three to four feet away from it; that her husband put his foot on the brakes and tried to stop. Her desription as to where Mr. and Mrs. Jonkman were lying after the impact was approximately the same as that of other witnesses.

"The abstract of record, consisting of 400 pages, embraces the testimony of other witnesses, but the foregoing is a substantial summary of the occurrence as related by eyewitnesses on both sides. There is substantially no dispute as to the salient facts, except as to the speed of defendant's automobile. However, there is nothing to indicate that the speed of defendant's car in any way proximately caused the accident. Moreover, the negligence of defendant, if any, has no bearing on the question of contributory negligence of plaintiff."

Plaintiff was precluded from petitioning the Supreme Court for leave to appeal from our order reversing the granting of a motion for a new trial and remanding the cause with directions to proceed in due course, but the Kavanaugh case gives plaintiff the right to appeal from

the order entered by the Circuit Court pursuant to remandment. On the basis of these doctrines, plaintiff re-asserts on this appeal each of the contentions urged on the former appeal to sustain the original order granting a new trial, and we are required to give them due consideration.

Following are the two principal contentions urged on this appeal: (1) that the Appellate Court "cannot hold, against the finding of the trial judge to the contrary, that the manifest weight of the evidence shows that plaintiff was contributorily negligent in crossing the street under the facts of this case"; and (2) that the jury verdict resulted from the prejudicial remarks, argument and conduct of counsel during the course of the trial. As to the first contention, we think it unnecessary to indicate at length what was said in our previous opinion with respect to plaintiff's contributory negligence. The jury evidently believed that the proximate cause of the accident was plaintiff's negligence in crossing the highway. We held that it was an abuse of the trial court's discretion to grant a new trial upon the record presented, and on re-examination of the record we find no justification for changing our view.

As to the second contention, we fully discussed the charges of plaintiff pertaining to the remarks, conduct and argument of counsel during the first trial and concluded that, on the whole, the case was fairly

tried and the verdict reflected the evidence as to the salient facts which were substantially undisputed. We adhere to that conclusion.

It is one of defendant's contentions that the judgment appealed from should be affirmed as a matter of course, pursuant to the doctrine of the law of the case, because the merits issues on the two appeals are identical. However, in the view that we take this is not necessary. Upon reconsideration of the record and the issues on the merits we adhere to our conclusions, as heretofore stated.

For the reasons indicated the judgment of the Circuit Court in favor of defendant is affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J., AND BRYANT, J., CONCUR.

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General No. 11070 Agenda No. 2

IN THE

APPELLATE COURT OF ILLINOIS

- - -

151 I.A. 2d 377

SECOND DISTRICT-FIRST DIVISION

- - -

October Term, A.D. 1957

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. HAROLD H. GREER, Plaintiff in Error.	Writ of Error to The Circuit Court of Winnebago County.

DOVE, P. J.

The Grand Jury of Winnebago County, on November 16, 1956, returned a two-count indictment against the defendant, Harold H. Greer. The first count charged him with an assault on August 4, 1956, with intent to kill and murder Jack DeBaere. The second count charged him with assaulting Jack DeBaere with a deadly weapon. The defendant pleaded not guilty, and a jury trial resulted in a verdict of guilty as to the second count and imposing on the defendant imprisonment in the county jail for 365 days and a fine of $500.00. After overruling a motion for a new trial, the trial court rendered judgment on the verdict, and to reverse that judgment the record is before us for review.

The record discloses that there is a fishing spot along the east bank of Rock River in the southeast part of the City of Rockford. August 3, 1956, was a warm evening, and Jack DeBaere, twenty-two years of age, Glenn Young, thirty-nine years of age, Loren Moore, twenty-eight years of age, and Gene Simms decided, after they had visited the American Legion Club and a tavern, to go fishing. They had previously fished at this particular spot, and in their car they had fishing equipment as well as a carton of beer. They arrived at the river about one o'clock on the morning of August 4 and parked their car on the east side of the dirt road, which runs parallel to the river, the car being some forty to sixty feet from the edge of the river.

The defendant, twenty-seven years of age, lived with his mother in the neighborhood of this fishing spot. He and his mother were the only witnesses who testified in his behalf, and according to his testimony, upon his arrival home, he heard considerable "cussing" and swearing down by the river and he immediately left his home and started toward the place where he heard the voices. As abstracted by his counsel, defendant then continued: "It was dark and I just about walked upon these men and when I seen I was on them I jumped into the weeds due to the fact that they were cussing each other and standing up there like they were ready to fight. I could see four people. I decided I had better go back to the house and get something to protect myself with because they did not sound like they were in any mood to talk sense or that you could ask them to leave without getting injured. I went back and my

mother was awake and I came into the house. I got my two rifles and loaded both of them. I went back down to the place where these men were. Their car was on our land and they were on the east side of the road and our land is east of that road. I walked within five feet of the two men who were closest to me and there were two other men by the car. I was holding that rifle in my right hand and I fired it into the air when I heard someone throw something over into the weeds."

The defendant continued: "I heard someone say 'What the hell.' or something like that in the way of surprise, and as they turned around I told them 'This is private property. We don't care for none of your kind down here, so get the hell out of here.' Jack DeBaere said 'This isn't private property. I have been fishing down here for a long time. This is not private property. It don't belong to you.' I said, 'I'm sorry, it is. We don't care for this kind of a thing. Get off or I'll . . . . and the next thing I know Jack DeBaere and Young charged me when I was within five or seven feet of them. Well, when they charged me they grabbed the rifle and the only choice I had was to relinquish one of the guns to save myself from having both rifles taken from me so I dropped one gun and pulled away from them. They were in the weeds on the edge of the road, maybe one foot on our line and one foot on the road. I started moving back cautiously and they kept coming at me like they were stalking a lion or something like that. As I was moving back, this Jack DeBaere--I was telling him to drop the gun and leave the property before someone would get hurt. He kept saying, 'It's a nice gun. I will take it home with me.'

The gun he had was a bolt action gun and he was messing with the bolt on the gun and I kept moving back and had moved back maybe ten feet or maybe more than that, finally the one word, the way he spoke, gave me a definite indication that he intended to use the rifle. He kept the rifle down in front of him and as long as the rifle stayed down in front of him I was trying my best to talk him out of taking the rifle and just drop it there and go home without any trouble. DeBaere then said 'When I get you here I am taking this rifle with me,' and as he pulled the rifle up, I fired my first shot low to his leg only to stop the man. I had no intention of getting shot myself and when the man still stood there with the rifle raised at me, within a split second I fired the rifle a second time and he fell over into the weeds and his partner, Young, was there and I told him to take him and the whole bunch of them in that car and get out of here."

According to the defendant's testimony DeBaere and Young were "husky" men and when the defendant approached them he observed that they were intoxicated; that when they "wrestled" one of the guns from him, they were approximately five feet in front of him, and DeBaere then pointed the gun he had taken from the defendant toward the defendant. This witness further testified that he weighed 170 pounds; that his left arm was in a bad condition and restricted in flexing, and while testifying defendant indicated to the jury its limitation in motion.

Defendant further testified that on the evening in question he had attended a school for flying at the air-field at Cherry Valley; that he passed a physical examination and had

left there between 9:30 and 10:00 o'clock and then went to the Grant Park Ballroom where he had a bottle of beer and where he remained until after midnight arriving home between 1:30 and 2:00 o'clock in the morning.

In answer to the question, "What was the necessity of both rifles?" the defendant answered, "Because I am injured, for one thing, and for the second reason, I have had those rifles fail on me before, and for the third reason, I intended to fire over their heads and that is exactly what I did. This is a repeating rifle. I fired a shot in the air when I was within five or seven feet of those men. After I fired the first shot I told these men they were on our property and that we didn't care for that kind of thing and for them to get the hell out of there. These two men jumped me and grabbed my arm and the rifle. They got the rifle from me and I jumped back. Neither had hold of my left arm. These two men kept coming forward and as I moved away I kept warning these men to get off our property. It was a minute or a minute and a half after Mr. DeBaere got the gun from me that I fired the second time."

According to the testimony of DeBaere, Moore and Young, they parked their car on the morning in question on the left side of an unimproved road adjacent to the river which the witnesses characterized as a popular fishing spot. Moore and Simms went down to the river a short distance away and DeBaere and Young were standing near the car when the defendant called to them to get off of his land. DeBaere and Young both insisted that they were not on defendant's premises and stated that the

river was too low for fishing and that they would leave. According to their testimony defendant then said: "I've taken enough of your crap during the war." At that time DeBaere and Young were standing some ten or twelve feet in frontof the defendant, and defendant had both rifles in his hands and shot one of them. DeBaere grabbed that rifle and wrestled it out of defendant's grasp, whereupon defendant fired another shot.

Following the shooting Mr. DeBaere was taken by his companions to the Swedish-American hospital in Rockford and there examined by Dr. William Jones who testified that he found two bullet wounds, one in his right pelvis and also a "through and through" puncture of his left thigh.

The errors relied upon by Counsel for plaintiff in Error for reversal are (a) that the trial court erred in refusing to permit defendant to testify as to his physical condition, (b) that the trial court erred in refusing instructions No. 10 and 11 tendered by defendant, (c) that the trial court prejudiced the jury against the defendant by its conduct during the trial.

Counsel for defendant offered to prove that defendant was involved in an accident a year previous to the occurrence in question and as a result thereof suffered a broken back, a broken ankle, a broken pelvis bone, a broken left arm, and that at the time of the hearing he was wearing a body brace to sustain his back. His counsel state that the physical condition of defendant was an element for the jury to take into consideration in determining whether defendant was physically able to defend himself or repel an attack.

The record discloses that defendant testified at the trial and described some of his physical disabilities. He testified that upon the evening in question he had passed a physical examination at the airport, which permitted him to obtain a commercial pilot's license under regulations of the Civil Aeronautics Authorities. He testified that he weighed 170 pounds, that his left arm was disabled and while testifying indicated to the jury its limitation and restriction in motion. The jury observed him as it did the other witnesses who testified. Under all the evidence found in this record, we do not believe it was reversible error for the trial court to sustain defendant's in error objection to this offer of proof.

It is next insisted that the trial court erred in refusing to give instructions No. 10 and 11 offered by defendant. Instruction No. 10, was in this language: " The Court further instructs the Jury that if upon all of the evidence in this case and facts and circumstances in evidence the Jury are of the opinion based upon such evidence that the State of Illinois has failed to prove the guilt of the defendant, Harold Greer, as to both Counts I and II in the Indictment, then in that event, the Jury should find the defendant, Harold Greer, not guilty as to both Counts I and II of said Indictment."

Instruction No. 11 is as follows: "The Court further instructs the jury that where a person acting as a reasonable person would have acted under the same or similar circumstances, is attacked by another and with the apparent intention on the part of such other person to do great bodily harm to such person so attacked, then in that event the court further instructs the Jury that the person so attacked has a right to repel such attack

with sufficient force to prevent him from receiving great bodily harm, even to the extent of taking the life of such person making said attack or of causing great bodily harm."

Instruction No. 13 told the jury that it had no "right in this case to convict the defendant, Harold Greer, upon doubtful and unsatisfactory evidence or upon the doctrine of chance that it is more likely that he is guilty than innocent and in this regard, the Court further instructs the Jury that before the Jury will be justified in convicting the defendant, his guilt of the particular crime in question in this suit must have been proven so clearly and concisely that it can be truthfully said that his guilt has been proven beyond all reasonable doubt and to a moral certainty, and if the Jury after having heard all of the evidence finds that the State has failed to establish the guilt of the defendant as above set forth, then in that event, the Court instructs the Jury that you should find the defendant, Harold Greer, not guilty."

The record in this case recites: "At the conclusion of the evidence and the arguments of counsel the court at the request of The People and defendant gave to the jury on behalf of The People and defendant, the following instructions." Then follows thirty-seven typewritten instructions. Fourteen of these instructions have typed thereon, in the right-hand corner, "1 Defendant," "2 Defendant," and continuing consecutively to "14 Defendant." Upon the margin of each of those marked "2 Defendant" to "9 Defendant," inclusive, and upon those marked "12 Defendant," "13 Defendant," and "14 Defendant" also, appears the written word. "Given." Three instructions, being those marked "1 Defendant, "10 Defendant," and "11 Defendant," are not marked in any way. The statement in the record, as above set forth, indicates all fourteen of defendant's tendered instructions were given.

Assuming, however, that the instructions marked "Given" were given and that the two instructions complained of, defendant's No. 10 and defendant's No. 11, as above set forth, were not given, there was no reversible error in refusing either of them. The substance of defendant's instruction No. 10 was embraced not only in defendant's given instruction No. 13, as above set out, but other given instructions were to the same effect. Instruction No. 7 told the jury that if two reasonable theories could be drawn from the evidence upon the first of which defendant would be guilty and upon the second theory he would not be guilty, it would become the duty of the jury to adopt the theory consistent with the innocence of the defendant and find him not guilty. Instruction No. 6 specifically told the jury that defendant could not be convicted under count one unless every essential element of that count was proven beyond all reasonable doubt and to a moral certainty. No specific instruction was tendered by defendant as to count two of the indictment, but in several given instructions the jury were told to acquit the defendant unless the State had proven him guilty beyond all reasonable doubt and to a moral certainty.

Instruction No. 10 was not a good instruction. It is an abstract proposition, and, if applied to the defendant in this case, it assumes he acted as a reasonable person and assumes that he was attacked. Furthermore, the court gave instruction No. 9, which was likewise an abstract proposition substantially the same as refused instruction No. 10, and there was, therefore, no necessity for the court to repeat what had been given. All that was proper in either of the refused

Assuming, however, that [illegible] "given" were [illegible] and that the jury in [illegible] of, deformability [illegible] 10 [illegible] No. 11, [illegible] fourth, were [illegible], there [illegible] reasonable [illegible] instruction No. 11 was [illegible] instruction No. 13, [illegible] but other given instructions were to the [illegible] effect. Instruction No. 7 [illegible] jury that if two reasons [illegible] evidence upon the first of which [illegible] and upon the second there [illegible] become the duty of the jury to [illegible] with the innocence of the defendant [illegible] Instruction No. 5 [illegible] not be convicted [illegible] element of that count [illegible] to a moral certainty. [illegible] by defendant as to count two [illegible] given instructions the jury were told to acquit the defendant unless the state had proven his guilt beyond all reasonable doubt and to a moral certainty.

Instruction No. 10 was not [illegible] is an abstract proposition, and, if applied to [illegible] in this case, it assumes no doubt as to reasonable reason and assumes that it was attached. Furthermore, the court gave instruction No. 9, which was likewise an abstract proposition substantially the same as refused instruction No. 10, and there was, therefore, no necessity for the court to repeat what had been given. All that was proper in either of the refused

instructions was fully covered by instructions that were given. (Allen v. The People, 77 Ill. 484, 487; People v. McClain, 410 Ill. 280, 288.)

It is finally insisted that throughout the trial the trial judge by his conduct indicated to the jury that he felt the defendant was guilty. Counsel state that the court objected to evidence, sustained his own objections, cross-examined the defendant and spoke to him harshly while he was on the witness stand, and questioned other witnesses in such a manner as to prejudice the jury against him.

In support of this contention counsel call our attention to the record which discloses that while the mother of the defendant was testifying, counsel for defendant asked her this question: "I think that Mr. DeBaere and at least two of these witnesses have said they were there at the same location at other times. Have you ever heard any disturbance there before?" The witnesses answered: "Yes, sir. Some." The court then inquired of counsel for the People: "Any objection to that?" to which counsel for the People replied: "No, your Honor." Counsel for defendant then asked the witness: "And at any time did you ever hear your son call the police department?" and the witness answered: "Yes, sir." The court then said: "Any objection to that?" and counsel for the People replied in the negative. The court then said: "Well, the court is going to make an objection. This man is charged with assault with a deadly weapon, and that is what this case is about, not the expression of people hearing noise and calling people." Thereupon counsel for defendant said: "We call the court's attention to the fact that counsel asked what brought out the police officers, that the defendant had not called the

instructions as to [illegible] covered [illegible] were given. [illegible]; [illegible]; [illegible]; [illegible] 210 Ill. [illegible]

[illegible] trial [illegible] trial the [illegible] he felt the defendant was guilty, [illegible] court objection [illegible] cross-examination [illegible] and [illegible] he was [illegible] in such a manner as to [illegible] jury [illegible]

[illegible] counsel [illegible] our attention [illegible] the record [illegible] that [illegible] of the defendant was testifying, counsel for [illegible] her this question: [illegible] two of those witnesses [illegible] location [illegible] them before [illegible] witness [illegible] the court [illegible] inquired [illegible] counsel for the [illegible] objection to that?" [illegible] counsel for [illegible] replied: "No, your honor." Counsel for defendant then asked the [illegible] "At [illegible] any time did you ever hear [illegible] call the police department" and the witness answered: "No, sir." [illegible] then said: "Any objection to that?" and [illegible] counsel for [illegible] replied in the negative. The court then said: "Well, the court is going to make an objection. This man is charged with assault with a deadly weapon, and that is what this case is about, not the expression of people hearing noise and calling people." Thereupon counsel for defendant said: "I call the court's attention to the fact that counsel asked what brought out the police officers, that the defendant had not called the

police department." The court then said: "Well, I call counsel's attention that I had that in mind and for the same reason. I say we can't go too far afield. Objection sustained. The court on its own motion stops it. I don't know how to do it." Counsel for defendant then said: "I object to the ruling of the court," and counsel for the People then said: "We would concede that this is a public place." Whereupon the court replied: "All right. If you want to go into all of that, strike out the remarks of the court and go into it as far as you want to. I am cautioning counsel, though. But go into it and there are no instructions at all. Wipe the whole thing out, everything I said. The jury will disregard it. Then go into the other times, the other occasions and habits of people." Counsel for defendant then asked the witness: "The question was, had you heard him call the Rockford Police Department on other occasions when there was noise down there?" The witness answered in the affirmative, and that concluded the direct examination of this witness.

The record also discloses that during the cross-examination of the defendant by the state's attorney, the court asked the witness a number of questions, but it was done to clear up an apparent misunderstanding by the witness of a question propounded by the state's attorney. At the conclusion of this series of questions by the court, the court said to the witness: "All right. That takes care of that. There is no misunderstanding about it at all." And the defendant replied: "No, sir. Now I understand it."

In People v. Lurie, 276 Ill. 630, at page 640, the court said: "The general rule is that the trial judge has a right to ask questions of witnesses or call other witnesses to the stand in order to ascertain the facts and elicit the truth as to the points at issue. No well considered authority has ever stated that the trial judge is a mere moderator or umpire between the contending parties. In order to establish justice and prevent wrong he has a large discretion in applying the rules of practice, but all this must be done in a fair and impartial manner, without in any way showing bias for or prejudice against either party of the litigation."

In People v. Marino, 414 Ill. 445, at page 450, the court said: "While the court has a wide discretion in the conduct of a trial, it must not invade the province of the jury by making comments, insinuations or suggestions indicative of belief or disbelief in the integrity or credibility of a witness."

In the instant case there is no claim that the court commented on the evidence, and where the court did make an objection and then sustained it, he subsequently struck out the remarks of the court and instructed the jury to disregard them. We have examined the record and don't believe the conduct of the trial court requires a reversal of this judgment.

Finding no reversible error in the record, the judgment of the Circuit Court of Winnebago County is affirmed.

Judgment affirmed.

McNeal J. Concurs,
Spivey J. Concurs.

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15 I.A. 2d 456

THOMAS A. SCOTT and MARY A. SCOTT, Appellees, v. CLARENCE WILSON and ELIZABETH BOYD, Appellants.	APPEAL FROM CIRCUIT COURT COOK COUNTY

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This cause of action arises out of the purchase by the plaintiffs--appellees, Thomas A. Scott and Mary A. Scott, from the defendants--appellants, Clarence Wilson and Elizabeth Boyd, of a certain piece of improved real estate in the City of Chicago commonly known as 321 East 69th Place, Chicago, Illinois, for the price of $24,000 on or about October 25, 1954, being in fulfilment of a contract entered into on or about September 11, 1954.

The original complaint filed herein alleged a fraud practiced upon the plaintiffs, asked the rescission of the contract, offered to return the property and demanded the return of the consideration. Subsequently, by leave of court, an amended complaint was filed. The order which allowed the amended complaint set forth that it was the representation of counsel for plaintiffs that the relief sought herein can be equitably changed to pecuniary damages in the alternative to the rescission as prayed for in the complaint, and allowed the filing of the amendment to the original complaint praying money damages. The amended

complaint, as filed, set forth the loss of income of $75 a month from a basement apartment, and then in its prayer for relief asked for a rescission of the contract and of the deed, as in the original complaint, and asked,"or in the alternative that defendants pay to the plaintiffs the sum of $5,298.19." A hearing was had before the court and the following order was entered:

> "This cause coming on for trial on the amended complaint and answer thereto and the court finding it has jurisdiction of the parties and the subject matter and having heard arguments of counsel finds:
>
> 1. That a certain false representation known to be false by the defendants made to the plaintiffs who relied on such representation believing it true, and because thereof entered into a contract to purchase certain property commonly known as 321 East 69th Place, Chicago, Illinois, and so did purchase said premises and because of such purchase were damaged.
>
> 2. The issues in favor of the plaintiffs and against the defendant herein and that the plaintiffs have the election to rescind the contract or in the alternative to be awarded $1,000 as liquidated damages; that the plaintiffs elect to take as damages the sum of $1,000.
>
> It is hereby ordered, adjudged and decreed that judgment be entered against the defendants in favor of the plaintiffs and that the defendants, Clarence Wilson and Elizabeth Boyd, pay to the plaintiffs, Thomas A. Scott and Mary A. Scott, the sum of $1,000 forthwith."

It is from the entry of that order that the defendants appeal.

The execution of the contract between the parties and the execution and delivery of the deed and the payment of the consideration in fulfilment of the contract was brought about in the following manner. The defendants-appellants (hereinafter referred to as defendants), represented by Elizabeth Boyd,

listed the property for sale with a real estate agent. The plaintiffs-appellees (hereinafter referred to as plaintiffs), came to the premises to inspect the same accompanied by their real estate broker--a different person than the defendants' broker. They were in the premises numerous times and inspected them entirely. They inquired about the renting of the premises and they were told that the second floor apartment was occupied by the defendants and that the first floor apartment was rented for $125 a month and that the basement apartment was rented for $75 per month. Upon that inspection and those representations the contract was executed and the transaction was closed in escrow at the Chicago Title and Trust Company, both parties being represented by their respective brokers. The plaintiffs entered into possession of the premises. They collected the rent of $125 on the first floor and $75 on the basement for some six or eight months. After that lapse of time they received a letter from the City of Chicago which advised them that the basement apartment had been constructed in violation of the building ordinances of the City of Chicago, and ordered them to desist from renting and using the basement apartment. The plaintiffs did that and thereafter started this litigation.

It is admitted that no direct representation by statements were ever made by the defendants in regard to the building ordinances of the City of Chicago as it

listed the property for sale with a real estate agent. The plaintiffs-appellees (hereinafter referred to as plaintiffs), came to the premises to inspect the same accompanied by their real estate broker--a different person than the defendants' broker. They were in the premises numerous times and inspected them entirely. They inquired about the renting of the premises and they were told that the second floor apartment was occupied by the defendants and that the first floor apartment was rented for $125 a month and that the basement apartment was rented for $75 per month. Upon that inspection and those representations the contract was executed and the transaction was closed in escrow at the Chicago Title and Trust Company, both parties being represented by their respective brokers. The plaintiffs entered into possession of the premises. They collected the rent of $125 on the first floor and $75 on the basement for some six or eight months. After that lapse of time they received a letter from the City of Chicago which advised them that they were operating the premises in violation of the zoning ordinances of the city, in that the area in which the premises were located were zoned as a two- apartment area, and ordered them to desist from renting and using the basement apartment. The plaintiffs did that and thereafter started this litigation.

It is admitted that no direct representation by statements were ever made by the defendants in regard to the zoning ordinances of the City of Chicago as it

related to these premises, or that the basement apartment had been legally constructed or that permits had been issued by the City of Chicago for the construction of the basement apartment. The question therefor presented is whether the conduct of the defendants in this case constituted fraudulent misrepresentations which would justify the rescission of the contract. In the case of Bennett v. Hodge, 374 Ill. 326, at 331- 332, the court restated the classical elements of fraud as follows:

> "It is agreed all of the following elements must be proved in an action based on fraud: (1) The misrepresentation must be of a statement of fact; (2) it must be made for the purpose of influencing the other party to act; (3) it must be untrue; (4) the party making the statement must know or believe it to be untrue; (5) the person to whom it is made must believe and rely on the statement; (6) the statement must be material."

It has been historically true that the misrepresenation is not confined to a statement of fact. The doctrine that was laid down in Leonard v. Springer, 197 Ill. 532, at 538, was restated in Racine Fuel Co. v. Rawlins, 377 Ill. 375, at page 380, as follows:

> "Any conduct capable of being turned into a statement of fact is a representation. It is sufficient if the proof shows acts such as to mislead a reasonably cautious and prudent man in regard to existence of a fact forming a basis of or contributing to an inducement to some change of position by him. (Leonard v. Springer, 197 Ill. 532.) Fraud is not presumed but must be proved like any other fact by clear and convincing evidence." (Citing cases.)

It is of course a well established rule that statements as to the value of property sold, or its quality, or the price the proposed seller has been offered for it, are

considered to be matters of opinion and not statements of fact. In discussing that question the court in Leonard v. Springer, 197 Ill. 532, pages 536-537, said:

> "It is true that the general rule is, that statements as to the value of a business or of real or personal property, made for the purpose of inducing another to buy or to invest money, may be, and generally are, treated as mere expressions of opinion, and if so intended and understood will not constitute fraud, in the absence of any misrepresentation of material, extrinsic facts or concealment of such facts. (14 Am. & Eng. Ency. of Law,-2d ed.-41.) The reason of the rule is, that such statements are expressions of opinion; but where they are made with the intention that they shall be understood as statements of fact, and not as the expressions of opinions, they will constitute fraud. (Murray v. Tolman, 162 Ill. 417.) We said in that case, (p. 423,) quoting from Pickard v. McCormick, 11 Mich. 68: 'It is only because statements of value can rarely be supposed to have induced a purchase without negligence, that the authorities have laid down the principle that they cannot usually avoid a bargain.'"

This brings us to the proposition: The right to rely upon representation made is not an absolute right, but one which must be exercised with ordinary prudence. This problem was discussed in Halla v. Chicago Title & Trust Co., 412 Ill. 39, at page 46, as follows:

> "The general rule is that a party guilty of fraudulent representations will not be permitted to charge negligence of the other party. Where one makes a positive statement to another, upon which the other acts in confidence of its truth, and such statement is known to be false by the party making it, such conduct is fraudulent and from it the party guilty of fraud can take no benefit. In such cases the question necessarily arises whether, under all the circumstances, the party seeking relief had the right to rely upon the representations made. In determining this question the representations must be viewed in the light of all the facts of which the party injured had actual knowledge and also such as he might avail himself of by the exercise of ordinary prudence. (Morel v. Masalski, 333 Ill. 41.)"

It will be noted here that the court speaks of one who makes a positive statement, and apparently does not refer to those whose conduct consists of a representation. In the case of Bundesen v. Lewis, 368 Ill. 623, at page 633, the court quoted from Morel v Masalski, 333 Ill. 41, as follows:

> "'A person in possession of his mental faculties is not justified in relying upon representations made when he has ample opportunity to ascertain the truth of the representations before he acts. When he is offered the opportunity of knowing the truth of the representations he is chargeable with knowledge. If he does not avail himself of the means of knowledge open to him he cannot be heard to say he was deceived by the misrepresentations. (Dickinson v. Dickinson, 305 Ill. 521; Hustad v. Cerny, 321 id. 354.) It is only in cases where the parties do not have equal knowledge or means of knowledge of the facts represented that equity will afford relief on the ground of fraud and misrepresentation.'"

And in the same case and on the same page the court also said: "Ordinarily one is not liable for false representations respecting a mere question of law." The rule was early laid down in Fish v. Cleland, 33 Ill. 237, at page 244:

> "A representation of what the law will or will not permit to be done, is one upon which the party to whom it is made has no right to rely, and if he does so, it is his own folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such. 5 Hill, *303."

That principle was followed in the case of Morel v. Masalski, 333 Ill. 41, at page 47. And in the case of Kazwell v. Reynolds, 250 Ill. App. 174, where Mr. Justice Wilson rendered the opinion of this court, which involved the question of the knowledge of the existence of a zoning ordinance and its effect upon the purchase and sale of vacant property which

was intended to be used in a certain manner by the purchaser, the court said (p. 177):

> "As a general rule it is a well-known maxim that ignorance of law will not furnish an excuse for any person either for a breach or for an omission of duty: Ignorantia legis neminem excusat. And this is as well established in equity as in law. Equity recognizes certain exceptions such as a fiduciary relationship, but the case at bar comes within none of these exceptions. Story's Equity Jurisprudence, vol. 1, sec. 173.
>
> If individuals were permitted to void solemn obligations because of ignorance of existing laws in force at the time of the execution of said instrument, then such existing laws would become useless and of no value. Story's Equity Jurisprudence (14th Ed.), vol. 1, sec. 173.
>
> The ordinance in question was a matter of record in the village where the property was located and was easily ascertainable by both plaintiff and defendant. If, as alleged in the bill of complaint, neither party knew of that fact, then it becomes the duty of the purchaser to have advised himself as to whether or not such an ordinance was in existence. The existence of a law in a State is a matter concerning which everyone is supposed to have knowledge, The only instance where a law may become a question of fact is where it is a foreign law and has to be proven. In such cases the law may recognize a mistake of fact where a person is misled by a foreign law in existence at the time of the execution of the instrument, The rule is well stated in Story's Equity Jurisprudence (14 Ed.), vol. 1, par. 221, where it is stated:
>
> 'A like principle applies to cases where the means of information are open to both parties, and where each is presumed to exercise his own skill, diligence, and judgment in regard to all extrinsic circumstances. In such cases equity will not relieve.'"

In the instant case the only representation in regard to the value was that certain rents were being collected on the first floor and basement apartments. Those rents were being collected at the time the representation was made and

continued to be collected by the plaintiffs for some six or eight months after the sale. There was therefore nothing false about that representation. It is argued that the fact that the basement apartment was occupied and that rent was being collected from it at the time and during the period that the plaintiffs inspected the property, was a representation by conduct that such occupation was within the law. It is very doubtful if such occupancy constitutes a representation by conduct, and if it does it comes clearly within two exceptions: First, it is not a representation of fact, but a representation of law; Secondly, it is the type of representation where both parties had equal opportunity to inform themselves and therefore the plaintiffs were not entitled to rely thereon. In addition thereto there is not the slightest evidence in the record that either of the defendants had any knowledge that the existence of the basement apartment was in violation of the building ordinance, and there was positive testimony that defendant Elizabeth Boyd did not know that a permit had not been issued to her husband for the construction of the apartment in the basement. The evidence of Clarence Wilson in regard to that was merely that he had nothing to do with the construction of the basement apartment; that it was done by his stepfather; that to his knowledge his stepfather did not have a permit. This certainly lacks the evidence of clear and convincing proof that such conduct could constitute a representation which the makers knew to be untrue.

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The judgment of the Circuit court is reversed and the cause is remanded with directions to enter judgment for the defendants and against the plaintiffs.

REVERSED AND REMANDED
WITH DIRECTIONS.

BURKE, P. J., and FRIEND, J., CONCUR.

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47161

15 I.A. 2d 457

IRVIN H. WEISS and MARIAN F. WEISS, for the use of Federal Life Insurance Company, Appellees, v. STANDARD INSURANCE COMPANY OF NEW YORK, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought suit on an insurance policy issued by defendant, seeking indemnification for damages alleged to have resulted from the collapse of a floor in their home. Trial by the court without a jury resulted in a finding and judgment for plaintiffs assessing damages in the amount of $4,469.99, from which defendant appeals.

The essential facts disclose that in April 1953 plaintiffs moved into a new seven-room split-level residence in Glencoe, Illinois. The lower level, which is of concrete construction and rests on the ground, consists of a living room, dining room, kitchen and den; the upper level has three bedrooms, a bath and a powder room. The house has radiant heating, the coils for which are imbedded in the concrete on the lower level and carried through the ceiling of the upper level. The living and dining room floors are carpeted, the kitchen and den floors tiled.

The policy issued by defendant insured plaintiffs against direct loss "to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the

property with material of like kind and quality within a reasonable time after such loss . . . "; it further provided that "the insured shall give immediate written notice to this Company of any loss, protect the property from further damage," and that "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with."

It appears that during October 1953 plaintiffs noticed that the northwest corner of the living room floor had pulled away from the baseboard about one and one-half inches; that the electric outlets in the dining room broke the plaster and were "moving down in the wall"; that the floor kept sinking and by May 1954 had sunk about eight inches in various portions of the dining and living room areas. Notice of this condition was first given to defendant in the latter part of May 1954, when plaintiffs notified defendant's agent of the loss. Several days later defendant's adjuster, Edwin J. Busch, came to inspect the premises. Irving H. Weiss testified that Busch told him that he was covered; he advised him to proceed with repair work and said that he wanted to examine the floor after it had been broken. Busch, on the other hand, stated that in his conversation with Weiss he told him he was unable to discover the cause of the floor condition, but that as long as he intended to repair in any event he (Weiss) should call him when a condition was found to reflect the cause. Busch also denied that he authorized repairs or told plaintiff he was covered by insurance.

During the month of May plaintiff engaged an architect to supervise the repair work which commenced in June. Several days later plaintiff called Busch to advise him that the work was being done, and it was agreed that Busch would come out with an engineer. After a week had passed and Busch had not yet come out, plaintiff called him again to advise him that he could not leave the floor open and that the men were going to start pouring concrete It was about a month after the concrete contractor had commenced work by breaking the concrete that Busch called and said that he would come out with an engineer.

Busch's testimony is to the effect that plaintiff called him after the concrete floor had been broken, that he went out to the house, that in the absence of Weiss but with his wife's permission he inspected the damaged area, that upon digging down into the substructure he found a large quantity of water, that the ground in the foundation that had been used as a backfill was the same as that used outside the foundation, and that he then called plaintiff and arranged to have an engineer examine it.

Early in June 1954 Busch and David B. Cheskin, a consulting structural engineer, appeared at plaintiff's home about nine o'clock one evening. This was Cheskin's first meeting with either Busch or Weiss. He inspected the premises inside and out; the living and dining room areas had then been almost completely repaired, but a small space in the entry hall had been left uncovered. There Cheskin dug a hole

about two feet deep and twenty inches in diameter which revealed a wet sandy soil. Cheskin, who had been engaged in the business of structural engineering for many years and had designed building structures of various types, was of the opinion that the condition of the floor was caused by subsidence, a settling of the soil, with the floor following the contour of the soil. It was his opinion that "the cause of settlement was due to the soil settling below the floor." Under cross-examination he stated that "as to whether the floor could have collapsed because not four inches thick and not re-inforced with steel mesh, you are using language that does not apply to this condition engineering-wise, so I can't answer."

Max Alper, a licensed architect who had been called in by plaintiff, after stating his qualifications and experience, testified that his inspection of the premises in May 1954 indicated that one part of the living and dining room floor had collapsed away from the other part; that measurements disclosed a drop graduating from one and one-half inches at one point to six and three-quarter inches at another; that after the concrete floor was broken he examined the premises again in June 1954 and found the foundation soil level and undisturbed, and that there was no subsidence in that area; that the concrete floor had not been built according to the plans which called for a four-inch floor--actually, it was not more than two and one-half inches thick; and that although wire mesh re-inforcement was called for there was no re-inforcement at all. As a result of these observa-

tions he was of the opinion that the direct cause for the collapse of the floors was that they "had no support and just dropped."

On the question of damages plaintiff testified that because of the condition of the floor and the necessary repairs he had the carpeting removed from the living and dining rooms and relaid after the repairs were completed, and for this service plaintiffs paid $112.00; that the cement contractor broke up the damaged area, tamped the ground, put gravel and insulating material in and finally poured concrete for replacement flooring, for which he was paid $1850.00; that the electrical contractor replaced wiring and outlets, for which plaintiffs paid $346.33; that the heating contractor replaced the heating grids and did other necessary work, for which he was paid $949.00; that the decorating contractor painted the living and dining rooms and the redwood outside his bill included other work as well and amounted to $550.00; that the landscaper reseeded the lawn and replaced bushes, for which he was paid $399.66; and that to the architect who supervised the work and rendered a report plaintiffs paid $390.00, computed at the rate of $15.00 per hour. The driveway, which was damaged by trucks in the course of the repairing process, was repaired at the cost of $198.00.

Witnesses on both sides testified that in July 1954 a meeting was held in the office of Frank L. Erion Company which was attended by Mr. Weiss, Max Alper, plaintiff's architect, Edwin Busch of the Frank L. Erion Company,

defendant's adjuster, a Mr. Couch, an executive of the defendant insurance company, and David B. Cheskin, defendant's engineer. At this meeting Weiss submitted his bills for work done to restore the house to the condition called for in the specifications; at the meeting Couch stated that the defendant company would have to rely on its adjuster's recommendation that the collapse was caused by subsidence, and that accordingly it would have to deny liability. Upon this state of the record the trial judge, who had painstakingly heard and examined the evidence and the questions of fact and the law presented, found that under the terms of the insurance policy the damages recoverable were limited to the amount necessarily expended in restoring the premises to the same condition that existed before the collapse of the floor, and with material of like kind and quality. At the same time the court granted plaintiffs' request for a reduction in the repair bills of $325.00 representing certain items of labor and material constituting improvement beyond the original condition of the house, and entered judgment in the aggregate amount of $4469.99.

It is first urged as ground for reversal that plaintiffs failed to give the defendant company immediate written notice of any loss and to protect the property from further damage, as required by the policy. The trial judge evidently rejected this contention for the reason that in their complaint plaintiffs alleged that they "duly reported said collapse to defendant and otherwise performed all required of them to do with respect to the terms of said policy,"

while in answer to this allegation defendant in its amended answer averred generally that it "denies plaintiffs duly performed all required of them as provided by terms of policy," but nowhere in its answer did defendant allege any facts whatever showing how plaintiffs failed to perform any of the conditions precedent set forth in the policy. As a result of this state of the pleadings, plaintiffs rely on rule 13 (3) of the Supreme Court (Ill. Rev. Stat. 1955, ch. 110, sec. 101.13) which provides that "in pleading the performance of a condition precedent in a contract, it is sufficient to allege generally that the party performed all the conditions on his part; if the allegation be denied, the facts must be alleged in connection with the denial showing wherein there was a failure to perform"; and they cite Enloe v. American Family Protection, Inc. (Abst.), 291 Ill. App. 623 (for a more informative abstract, see 9 N.E.2d 728), which is precisely in point. There the court, with reference to rule 13 (3), held that "if defendant wished to rely upon the defense that such a condition had not been performed it would under Rule 13 be required to deny it by answer and allege facts showing wherein there was a failure to perform. Defendant's general denial was not in accordance with requirements of Rule 13 and did not raise an issue on plaintiff's performance of the conditions precedent." This, the court held, "would leave plaintiff's general allegation of performance of conditions untraversed and should stand as admitted by defendant." McCuan v. Claro,

(Abst.), 319 Ill. App. 520 (for a more informative abstract see 49 N.E.2d 321), is to the same effect. The trial judge further held that in any event there was sufficient evidence in the record to sustain the finding that plaintiffs had performed all conditions precedent on their part. The record discloses that the sinking of the floor was very gradual, progressing from one and one-half inches in October 1953 to eight inches in May 1954. It could not have been anticipated in October 1953 that the floor would eventually sink to the extent of eight inches and that an entirely new concrete floor would have to be installed, and plaintiffs argue that the need to replace the concrete floor first came to their knowledge in May of 1954, and that then, for the first time, there arose a possible claim for damages under the terms of the policy. They rely on Star Transfer Co. v. Underwriters at Lloyds, 323 Ill. App. 90, a case also cited by defendant, wherein the court said that "the applicable rule to be deduced from the authorities is that notice is not required until such facts have developed as would suggest to a person of ordinary and reasonable prudence that liability might arise; and the requirement is met by giving notice within a reasonable time after the injury presents aspects of a possible claim for damages," citing cases from several other jurisdictions. Moreover, defendant was not prejudiced by the alleged delay in giving notice because, as the trial judge found, the sinking was progressive, the same work

was required the first day of the sinking as the last, there was no prejudice by any delay, and therefore the notice given was timely. In Simmon v. Iowa Mutual Casualty Co., 3 Ill.2d 318, the court stated: "We are in agreement with the contention that lack of prejudice may be a factor in determining the question of whether a reasonable notice was given in a particular case yet it is not a condition which will dispense with the requirement." It was there held that where the trial court found that notice was given within a reasonable time, the Supreme Court is without power on review to set aside such factual finding if it is not against the manifest weight of the evidence. In Higgins v. Midland Casualty Co., 281 Ill. 431, where more than a year had elapsed before notice was given, the court decided it was a question for the jury as to whether notice was given in a reasonable time, taking into consideration all the facts and circumstances shown by the evidence.

We have already set forth the conflicting evidence as to the cause of the damage. Plaintiffs take the position and adduce evidence that the damage resulted from improper construction and insufficient support. Defendant, on the other hand, relies on the testimony of Cheskin that it was caused by subsidence which is the exclusionary proviso of collapse in the policy. The trial judge was in a better position than are we to determine the facts and found that, notwithstanding the conflict in the testimony, the collapse was due to improper construction

and insufficient support rather than subsidence, and upon examination of the record we think this finding is supported by the evidence.

The remaining question relates to the damage. Defendant argues that proof of the extent of loss and damage was not substantiated by competent evidence, and that the extent of recovery should be "the actual cash value of the property at the time of ~~xxx~~ loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss." In making proof of damage, plaintiffs' witness Alper, the architect who supervised the repair work, testified that all the repairs were necessary and proper to correct the damaged condition, and the introduction of the receipted checks in support thereof constituted prima facie proof that the charges were fair and reasonable. Defendant offered no evidence whatever to disprove that the work was necessary and proper, or that the charges were fair and reasonable. In Sitnick v. Glazer, 11 Ill. App. 2d 462, the court considered the competency of receipted bills and canceled checks therefor offered as proof that the charges were fair and reasonable and stated that "the rule is that where a receipted bill is introduced it is sufficient prima facie proof that the charges were fair and reasonable," citing various Illinois decisions. Defendant's argument that the repairs comprising the amount of the judgment go beyond the terms of the policy in that they improve or

enhance the value of the premises beyond its original condition is without merit. As heretofore stated, the trial court was extremely cautious in examining the items of repair and replacement which might conceivably be construed to constitute an improvement or enhancement rather than a necessary repair or replacement, and to eliminate those items of repair which might not be directly related to restoring the property to its original condition. Bills covering the repair of the outside sidewalk and certain landscaping were eliminated at plaintiffs' suggestion.

We find no convincing reason for reversal, and accordingly the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

BURKE, P. J., AND BRYANT, J., CONCUR.

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NO. 11094 (PUBLISH ABSTRACT FORM ONLY) Ag. 10

15 I.A. 2d 458

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
Second Division

OCTOBER TERM, A. D. 1957

CHESTER BURRIS, Plaintiff-Appellee, v. COMMERCIAL CREDIT CORPORATION, an Illinois corporation, Defendant-Appellant.	Appeal from the County Court, Winnebago County

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PER CURIAM:

On September 22, 1955 the plaintiff, Chester Burris, purchased a new automobile for $2881.56. He paid the auto dealer $300 in cash and traded in an old car for $635. Insurance premiums and emergency benefits amounted to $259 and finance charges were $458.44. Plaintiff executed a conditional sale contract and agreed to pay the balance amounting to $2664 in 36 monthly instalments of $74 each, beginning on November 3, 1955. The dealer transferred the contract to the defendant, Commercial Credit Corporation. Shortly after the first instalment was paid, defendant repossessed the automobile. In his complaint filed on April 9, 1956, plaintiff alleged the above facts and prayed for judgment against defendant in the amount of $1009. Defendant answered: that the conditional sale contract provided in part: "If Purchaser defaults on any obligation under this contract, or, if holder should deem itself or said car insecure, the full balance shall, without notice, at the option of the holder, become due forthwith, together with attorneys' fees of Fifteen Per cent (15%) of the unpaid balance if this contract is placed with an attorney. * * * and holder may, without notice or demand for performance or legal

[illegible]ns, lawfully enter any premises where the car may be found, take [illegible]ession of it and retain all payments as compensation for the use [illegible] the car while in Purchaser's possession. * * * The car may be sold [illegible] or without notice at private or public sale (at which the holder [illegible] may be the purchaser), with or without having the car at the sale, [illegible] proceeds, less all expenses, shall be credited on the amount payable [illegible]under; Purchaser shall pay any remaining balance forthwith as liqui[illegible] damages for the breach of this contract, and shall receive any [illegible]plus"; that on November 9, 1955, defendant learned that the automobile [illegible] being used and had been used by plaintiff's brother, Merle Burris [illegible] other persons in the robbery or attempted robbery of certain business [illegible] Rockford, and the automobile was impounded by the Police Department [illegible] city; that defendant had good reason to feel, and did in [illegible] feel, insecure, and on account thereof, repossessed the auto[illegible] and declared the full purchase price due and payable; and that [illegible] sold the car and credited the net return thereof amounting to [illegible]74 on the total due defendant, leaving a deficiency due defendant [illegible]ting to $679.43. In its counterclaim defendant alleges: that the [illegible] purchase price for the car was $3599, which price had been reduced [illegible] plaintiff to $2590 as of November 7, 1955; that on November 9 defendant [illegible] reason to feel, and did in good faith feel, insecure" and [illegible] the car; that after such repossession defendant sold the car [illegible] private sale for $1723 and after payment of the costs of sale, the [illegible] of $1[illegible] was credited on the balance of the purchase price, leaving [illegible] deficiency due defendant of $679.43, together with lawful interest th[illegible]. [illegible] answer or reply was filed by plaintiff to the counterclaim.

Appellant contends that by the failure to answer its coun[illegible] plaintiff admitted all the material averments thereof. We th[illegible] [illegible] advantage can be taken in this court of plaintiff's failu[illegible] [illegible]ability for the deficiency claimed under the counterclaim, f[illegible] following reasons: (1) defendant proceeded to trial without [illegible] answer to its counterclaim and thereby waived the answer [illegible] [illegible] the case on the merits as though the issues had been [illegible]

[illegible] plaintiff makes this contention for the first time [illegible]

The abstract in this case is nothing more than an index to the record in so far as it pertains to the judgment of the trial court, the motion for new trial, the order denying new trial, and the notice of appeal. In order to ascertain in whose favor the judgment was rendered and who moved for a new trial, and from what the appeal was taken, it is necessary for this court to examine the record. According to the record the case was tried before the court without a jury, the court found the issues on the complaint and counterclaim in favor of the plaintiff and entered judgment against defendant for $1009. Defendant's motion for a new trial was denied. Defendant appealed from the judgment entered against it and from the dismissal of its counterclaim. Appellant's position is that the evidence definitely shows that defendant acted in good faith and had reasonable and probable cause for feeling insecure [illegible] and indebtedness and that the respossession and sale was improper. Although appellee filed no brief on this appeal, the case will be disposed of on its merits.

Plaintiff testified that on November 7, 1955 he had been [illegible] two or three weeks charged with contributing to delinquency, and remained in jail two or three weeks thereafter until the charge was [illegible]. He asked his mother to make the November payment on the car [illegible] him that she had to take his nephew, Robert Richardson, [illegible] to a heart specialist, so plaintiff gave her the keys to his [illegible] gave his brother, Merle Burris, permission to drive the [illegible] let him ride in it because they didn't get along. A [illegible] after November 7 his mother told plaintiff that his brother [illegible] had taken the car. When plaintiff got out of jail, Commercial [illegible] offered them another payment but they said the [illegible] get the car back was by paying the balance in full.

Mrs. [illegible] Burris, plaintiff's mother, testified [illegible] the key to the car [illegible] for [illegible] her son that no one [illegible] the car [illegible]

About eight or nine in the morning of the day she had an appointment at the clinic in Chicago, she gave the car keys to the Richardson boy to get the car filled with gas. She next saw Richardson two or three days later. The car had been picked up by the police. Mrs. Burris and her daughter drive the car home from the police station. She had just [illegible] the car home when defendant came after the car. They said they would have to have the entire balance on the car and if she didn't give the car to them they would send the sheriff after it. They promised to return the car when her son got out of jail. Plaintiff had used the car to drive back and forth to work. He wouldn't let his brother, Merle [illegible] car.

The conditional sale contract was admitted in evidence. The terms of purchase as alleged by plaintiff appear on the face of the contract. The matters alleged by defendant appear in fine print on the reverse side of the contract. The back of the contract also shows the terms of the dealer's assignment and numerous other provisions, [illegible] that when assigned the contract is free from any claim whatever which the purchaser may have against the seller; that the purchaser authorizes confession of judgment against him anywhere in the United States except Indiana and New Mexico; that purchaser waives all right of appeal, all right of valuation, appraisement and exemption laws, now in force or hereafter passed, including stay of execution, appraisement, condemnation, etc., and that the car is accepted without any express or implied warranties, etc., unless expressly set forth in the contract.

For the defendant, Patrolman Walter Smith testified that about 2:00 A. M., on November 8, he and Officer John Cunningham chased the car involved in this suit for about two miles out of Rockford and when they stopped the car they found it occupied by Merle Burris. On the front floor board they found a notary seal, a ball peen hammer, three pairs of gloves, two pistols and some change in the front ashcan.

Edward Donnelly testified: that he was the manager of defendant's Rockford office; that on November 13 or 14 he went to the police department and found Mrs. Burris and her daughter there; that he

[illegible] but the police demanded [illegible]

[illegible] was against the car that the officers told [illegible] [illegible] allowed the car to him if one paid the fee that [illegible] [illegible] come to repossess the car at the [illegible] [illegible] that a .22 caliber pistol had been found [illegible] [illegible] the car was "in jeopardy" [illegible] repossession [illegible] knowledge of any criminal record of the plaintiff, after [illegible] repossessed the car it was sold by the auto dealer [illegible] January 1, 1960, for $1040 and [illegible] [illegible] defendant's office that [illegible] [illegible] [illegible] treasure and thereafter [illegible]

Detective Curtis Sanders testified that [illegible] stopped Robert Richardson on a street in [illegible] [illegible] Richardson then admitted that he and [illegible] attempted to burglarize a garage. The officers [illegible] [illegible] been stopped and brought out and the car back to Merle Purvis and Richardson made statements to the police [illegible] were not introduced in evidence. Detective Sanders [illegible] [illegible] the statements later for [illegible] [illegible] [illegible] the statements were neither [illegible] [illegible] "to expedite the matter", defendant's counsel [illegible] Detective Sanders concerning the substance of the [illegible] [illegible] it appears that the statements show that [illegible] Richardson had been using the car "for the last month [illegible] burglaries" and that "the use of this car by Merle Purvis [illegible] [illegible] of his brother, Chester Purvis." Referring to [illegible] appellant states as an undisputed fact that [illegible] were constantly using the car for over a month with the consent of the plaintiff and argues that there was an arrangement [illegible] car in these escapades, that the preponderance of the [illegible] use was with the consent and knowledge of the [illegible] record definitely shows a discovery of [illegible] and that the consent [illegible] for such use.

[illegible] for defendant's feeling of insecurity. Examination of the record discloses that Detective Sanders said that the boys had been using the car "possibly" for the last month or so and that defendant's attorney led the detective to answer affirmatively the question "Do either of these statements show that the use of the car by Merle was with the consent of Chester Burris?" On cross examination it appears that at the time Merle Burris was arrested the officers thought that the car was possibly stolen and that their inquiry was prompted by the circumstances rather than a desire to determine whether the owner knew that the car was being used by burglars and consented to such use.

The Supreme Court has said that the discretion given a mortgagee under an insecurity clause is not an arbitrary one, but the mortgagee must exercise his judgment in good faith, and he must have such grounds for feeling himself insecure as amount to probable cause. Hogan v. Ayer, 181 Ill. 448, 455. The mere fact that the mortgagee declares that he feels himself unsafe and insecure is not conclusive. When that question is put in issue and it appears from the proofs that the mortgagee had no probable cause or reasonable grounds to feel himself unsafe and insecure the taking must be held to be unlawful. Roy v. Goings, 96 Ill. 26.

In our opinion the evidence shows that plaintiff was in [illegible] during the latter part of October and the first part of November, [illegible] for an offense which was subsequently dismissed; that two or three days before November 7 he gave the car keys to his mother so that she could use the car to take a nephew to a clinic in Chicago; that early on November [illegible] plaintiff's brother and nephew were involved in burglarizing three cars in Rockford and used the automobile to travel to and from the burglaries; that the car was returned to plaintiff's mother not later than November 13 or 14; and that defendant immediately repossessed the car. There is no evidence in the record that plaintiff was in default under the contract at the time the car was repossessed, and no competent evidence that even tends to show that plaintiff knew that his brother or the nephew were driving his car, or that he consented to their use of the car, or that he knew or consented to their use of the car for transportation to and from the

burglaries, or that plaintiff was guilty of any dishonesty of purpose connection with this automobile. Any basis for defendant's feeling of insecurity arising from the use of the car by plaintiff's brother and nephew was terminated when they were incarcerated for the burglaries.

Defendant does not claim any feeling of insecurity because plaintiff's mother had possession of the car, but contends that its feeling of insecurity was enhanced by her statement at the police station that she had to have the car because they were going to Indiana the next day. The contract contains no provision prohibiting use of the car out of the state of Illinois. It cannot be said as a matter of law that the temporary use of the car in another state had the necessary effect of defeating defendant's lien or of impairing its security. Cook v. [illegible] Corp., 191 S.C. 440, 4 SE 2d 801, 125 ALR 306, 311. At the time of the repossession the car had been returned to the custody of plaintiff [illegible] after she had paid the towing charge and after defendant had accepted November payment from her. We agree with the trial court that defendant then had no probable or reasonable cause for feeling insecure and that the repossession under these circumstances was unlawful. Since the repossession of the car was unlawful, defendant was not entitled to judgment for deficiency under its counterclaim.

This cause having been heard by the court without a jury, the findings of the trial court on questions of fact are entitled to the weight as a jury's verdict, and in reviewing the judgment [illegible] court's determination of questions of fact are concerned, we are to be guided by the same principles as would be applied had there been a jury verdict. It was the trial court's function to observe the witnesses, conduct and demeanor while testifying, to determine their credibility, interests and motives, if any, to weigh the evidence, and to determine the preponderance thereof. Where the trial court has heard the testimony and observed the witnesses, we are not at liberty to disturb its judgment unless we can say that such judgment is manifestly against the weight

[illegible] state [illegible] the [illegible] as well as appellant [illegible] although the evidence is somewhat conflicting [illegible] say that the evidence shows conclusively that defendant [illegible] had probable cause [illegible] reasonable [illegible] state and knowing when the car was repossessed [illegible] judgment is contrary to the manifest weight of the [illegible] of the County Court [illegible] County [illegible] affirmed

[illegible]

A

15 I.A. 2d 458

General No. 11093 (Abstract only) Agenda 5

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT
(First Division)
OCTOBER TERM, A. D. 1957

CITY NATIONAL BANK OF KANKAKEE, Kankakee, Illinois, Administrator of The Estate of ROBERT EUGENE BISSAILLON, Deceased, Plaintiff-Appellee,	
vs.	Appeal from the Circuit Court of Kankakee County.
CITY OF KANKAKEE, Defendant-Appellant.	

SPIVEY--J.

This is an action for the alleged wrongful death of Robert Eugene Bissaillon, deceased. At the time of his death, Robert was six years of age. Robert was drowned on January 31, 1956 when he fell through ice covering a water filled quarry located in a residential section of the defendant, City of Kankakee. The premises whereon the quarry was located was owned by the City of Kankakee. Plaintiff, City National Bank of Kankakee, as administrator, filed its complaint for wrongful death in two counts.

We deem it unnecessary to reiterate the charges of the complaint and the contents of the answer since a close examination of the evidence will be required. Suffice to say that count one prayed damages on a theory of "attractive nuisance" and count two alleged that the defendant knowingly maintained an extra hazardous and dangerous condition by means of an exposed, unguarded quarry, wherein trash and debris was dumped, and that the defendant knew that small children customarily played on the property and could reasonably have anticipated that the children would be injured.

A trial by jury resulted in a verdict for the plaintiff in the amount of three thousand dollars and from the judgment entered upon the verdict, this appeal is taken.

Defendant contends that the trial court erred in giving one of the plaintiff's instructions and in refusing to give three instructions tendered by the defendant. The propriety of the court's ruling on the instructions will be considered after a consideration of the evidence.

It is also alleged that plaintiff failed to make a prima facie case as a matter of law and that it was the court's duty to direct a verdict against the plaintiff. This court then, is not obliged to weigh the evidence, but rather to determine if there is any evidence with its inferences most favorable to the plaintiff tending to support the plaintiff's cause of action.

Defendant takes the position that there is no evidence to establish an attractive nuisance and unless an attractive nuisance be present on the premises, there was no duty of the defendant except to refrain from wilfully and wantonly injuring the plaintiff's intestate. Defendant contends that a canal, a pond, or other body of water is not, of itself an attractive nuisance, and the authorities as well as practical consideration, would dictate such a result. Were it otherwise, an owner of land upon which was located a stream, canal, or pond would become the insurer of children playing in these bodies of water with or without permission. Hindeman v. Sanitary District of Chicago, 317 Ill. 539; Peers v. Pierro, 336 Ill. App. 1-4. The very rule however is pregnant with the conclusion that a stream, canal, or pond together with some other attractive agency might well constitute an attractive nuisance and the cases again support this reasoning. Gustafson v. Consumers Sales Agency, 414 Ill. 235; McMahon v. City of Pekin, 194 Ill. 141.

Let us examine the evidence to see if this case falls within the confines of the principles of attractive nuisance.

The evidence favorable to plaintiff and the admissions in the pleadings established that the defendant was the owner of premises whereon there was an abandoned quarry which had been filled by the defendant by dumping trash therein. A natural stream was diverted through the premises and a pond of a depth of approximately eight feet was created on the premises. This pond was in a thickly populated residential area in the City of Kankakee. Near the premises was the grade school which the decedent was attending at the time he was drowned. The quarry was estimated to be from 70 to 150 feet wide and 600 feet long from Entrance Avenue on the east to Fifth Street on the west. On the north of the quarry there was an alley or unpaved street which extended between Entrance Avenue and Fifth Street. It was about twelve feet wide and 100 feet from the quarry. This alley was regularly used by the neighborhood as a rear entrance to their homes. From the edge of the water on the north side of the quarry, there was a gradual slope of approximately 50 feet to the top of the bank. On the east side of the quarry there was a fence along Entrance Avenue. There was also a fence along Fifth Street on the west. On both the east and west sides of the quarry, there was an opening in the fence to allow access to the alley or roadway along the north side of the quarry. On the north and south sides of the quarry, there was no fence. The evidence indicates that the

quarry was visible on the north from the alley or roadway and on the south from Stone Street. Children used the alley on the north of the quarry daily in going to and from the grade school. They were also known to play around the quarry and the decedent, with other children, was said to have played on the ice of the quarry the day before his death.

The quarry was used as a city dump prior to 1948 and since that time individuals have continued to use the quarry as a dumping ground. All manner of items were dumped in the quarry by the people in the area as well as the trucks collecting trash in the defendant city. There was testimony that barrels, cans, bottles, tubs, wood, sticks, Christmas trees, and a myriad of other items could be found around and in the quarry.

On the date of the occurrence, the weather was cold and the quarry was frozen. There was some snow on the ground and on the ice covering the water. Plaintiff's intestate left his home, approximately two and one-half blocks from the school, at 8:45 A.M. It was cold and snowy. Robert called for his friend Gary King, who lived across the street and together they started to school. Gary was eight years old at the time. The boys walked up Entrance Avenue to the alley and turned west down the alley by the quarry. Robert suggested that he and Gary go down to the quarry and go on the ice, but Gary refused, and Robert went down alone and walked onto the ice. The evidence was to the effect that Robert used a little path on the bank

to approach the edge of the quarry. Near where he slipped and fell into the water, there was a can and some rocks, but it does not appear that he went on the ice to retrieve these objects. Gary tried to save Robert but he was unable to reach him and he went to school and reported what had happened. The fire department was summoned and they were successful in locating the body about three and one-half hours after the drowning. The firemen worked from boats and broke the ice in order to probe for the body. Many objects were pulled from the water by the firemen while probing and the evidence indicated that objects could be seen through the ice, and that certain objects were frozen into the ice. Robert had been warned about going near the quarry and his father had spanked him when on another occasion he came home with a wet pant leg. The child's mother testified that she had instructed him not to go to school through the quarry and told him to stay on the street.

In the view we take of the evidence, we are called upon to determine whether an unprotected dumping ground, located in a highly populous area wherein there is a sizable body of water, can be an attractive nuisance. We believe that such a place could constitute an attractive nuisance if such was the conclusion of the jury.

The Supreme Court in the case of Gustafson v. Consumers Sales Agency, 414 Ill. 235, passed upon a factual situation almost identical with the case at bar. At page 249, the court in discussing the facts of the Gustafson case stated, "With reference to the evidence in support of

these allegations there is testimony that the unguarded accumulation of water, to a depth of some fifteen feet in some areas, was located within a populated area of the city, and was clearly visible from the backyard of one of the children with whom the deceased child customarily played. The exhibits as well as the testimony reveals numerous objects, including tree stumps, bottles, and a five gallon drum partially frozen in the watercourse. There is further testimony that children had been sliding on the wet and partly melted ice two days before the accident, and shortly before that date a child who had been sliding on the ice fell into water up to her waist. The evidence is conflicting as to whether the ice was entirely frozen, but it is uncontroverted that it was not frozen at the point where the deceased child fell through."

In the instant case, there was an unguarded accumulation of water to a depth of eight feet in some areas. The property was located within a populated area of the city and clearly visible from the public streets and alley. Both the testimony and exhibits disclose numerous articles in and about the watercourse. Defendant's exhibit number one discloses trash on the south side of the quarry, and the testimony is to the effect that there were other objects on, in, and under the ice. Here, there is testimony that children had been seen playing just days before the accident and that small children had crossed the premises daily going to and from school. There is such a

property was

similarity of factual situations with the case at bar and the Gustafson case, supra, that we feel the Gustafson case is controlling.

Defendant contends that the evidence fails to show that the decedent was attracted by the can or the rocks on the ice, and, therefore, the plaintiff failed in its burden of proof on proximate cause. This position is unsound and is premised on an assumption that the can or rock or other object is the attractive nuisance. The attractive nuisance is not a can, or a rock, or a barrel, or any other single item which could be found in this watercourse, but rather the premises with the additional element of allurement which these items added to an already attractive watercourse.

From the view we take of the evidence, the whole of the premises constituted an attractive nuisance. The watercourse known to be filled with many different objects on and beneath the surface of the water together with the items of junk on the sloping banks visible in the defendant's exhibits, are sufficient to transform the most innocuous premises into a veritable paradise for an inquisitive childish mind. The "treasures" which could be foraged from the bank and the watercourse would defy even the wildest imagination of the immature. Where else could a child find an old broken lantern, a worn out tire, cans, wash tubs, and a baby buggy, just for the taking.

We conclude that the pond was a part of this attractive nuisance and when the child drowned, his death was in fact proximately caused by the attraction.

Even if we did not reach this conclusion, there is evidence to support the plaintiff's case. It was established that the items in the pond could be seen through the ice. Also, the witness to the death testified that the decedent walked straight to the place where he met his death. It was not said that he went on the ice to slide and play but his conduct would indicate a purpose. We cannot say that, considering the evidence and all the legitimate inferences therefrom in the aspect most favorable to the plaintiff, that the plaintiff was not on the ice to look for objects under the ice. Neither are we able to say that the decedent was not using the ice to cross to forage on the south bank. Considering the evidence in this light, as we must do at this time, we believe that the evidence is stronger in this case than in the Gustafson case, supra.

Counsel for the defendants have cited Mindeman v. Sanitary District, 317 Ill. 529; Peers v. Pierce, 336 Ill. App. 134; and Woods v. Consumers Co., 234 Ill. App. 530, the same cases as were cited by the defense in the Gustafson case, supra. Justice Bristow has succinctly analyzed and distinguished each of these cases from the factual situation which existed in the Gustafson case. In view of our conclusion that there is a unique factual similarity in this case and the Gustafson case, to attempt to enlarge upon this analysis would be presumptuous and would serve only to extend this opinion without elucidation. We adopt that portion of Justice Bristow's opinion.

One case is cited by the defendants in the case at bar and not discussed in the Gustafson case, supra. It is City Trust and Savings Bank v. City of Kankakee, 254 Ill. App. 489. There, there was involved the same quarry and the same defendant. However our opinion in that case did not discuss the question of attractive nuisance. The case was tried on an entirely different theory and is not conclusive or even persuasive in this case. Plaintiffs in the former case stated, "There is no question of attractive nuisance or of wilful and wanton action in the case." City Trust and Savings Bank v. City of Kankakee, 254 Ill. App. 489, 490. In the case at bar there was a count in the complaint based upon the attractive nuisance doctrine and the evidence sustains the jury's finding. The distinctions in the case are at once apparent and the fortuitous happening of these tragedies at the same quarry, while perhaps pointing up the dangerous nature of the place, is without further legal significance.

Complaint is made of one of plaintiff's instructions which called to the attention of the jury certain evidence they could consider in determining whether or not the defendant was liable. The jury was not told that this was the only evidence they should consider but from a preponderance of the evidence they could consider certain facts, together with other evidence in reaching their decision. No complaint is made of the form or style of the instruction but the defendant contends that the instruction failed to call to the attention of the jury the specific attraction to the decedent.

As we previously stated, the attractive nuisance was not a can or a rock, but the premises whereon there was a watercourse containing many foreign objects which injected additional elements of allurement. The attraction was the whole of the premises, of which the watercourse constituted an attractive and fatal part. The instruction complained of did not purport to contain all the elements necessary for the jury to find in order to find the defendant liable. Defendant gave other instructions which called to the jury's attention certain elements of the plaintiff's case. We do not feel that plaintiff's instruction number one was erroneous.

Defendant's instruction number one which was refused by the Court was as follows:

"The Court instructs the jury that in order for Plaintiff to recover upon the theory of an attractive nuisance in this case, it must show, by preponderance of the evidence, first that the Plaintiff's intestate was attracted to the premises in question by a dangerous instrumentality other than the frozen pond or creek or body of water; second that such instrumentality must have been such that it would likely or probably result in injury; third, that the element of danger must have been hidden, concealed or unknown; fourth, that said instrumentality must have been the direct proximate cause of the death complained of. If you find from the evidence in this case that any of the aforesaid elements have not been proved by preponderance of the evidence, you should find the Defendant, City of Kankakee, not guilty." This instruction tells the jury that a body of water cannot be

[illegible]

must have been [illegible]

said instrument [illegible]

of the death could find [illegible]. If you find from the evidence in this case that any of the aforesaid elements have not been proved by preponderance of the evidence, you should find the Defendant, City of Kankakee, not guilty." This instruction tells the jury that a body of water cannot be

an attractive nuisance. It states that in order for the plaintiff to recover on the theory of attractive nuisance, plaintiff must prove that plaintiff's intestate was attracted to the premises by a dangerous instrumentality other than the body of water. This is not the law. In Gustafson v. Consumers Sales Agency, 414 Ill. 235 at page 249, the court said, "Although it is settled that an open body of water on private property is not in itself an attractive nuisance, (Mindeman v. Sanitary District, 317 Ill. 529; Baers v. Pierre, 336 Ill. App. 134,) nevertheless, where the water contained unusual attractive elements such as a floating log (McMahon v. City of Pekin, 154 Ill. 141,) or a thick scum which appeared like a path, (Cicero State Bank v. Bolise & Shepard Co., 298 Ill. App. 290,) or a boardwalk above the water (Howard v. City of Rockford, 270 Ill. App. 155,) the courts have held that the watercourse constituted an attractive nuisance. In this case, the water with its added element of allurement was an attractive nuisance and the plaintiff was not obliged to show that a particular article attracted the decedent. The court properly refused defendant's instruction number one.

The court also refused defendant's instruction number three. This instruction was in the following form:

"The court instructs the jury that if you find that the defendant, City of Kankakee, was the owner of or in possession of and operated and controlled the premises described in the complaint and if you further find that plaintiff's intestate was on the premises where said creek

was located, then and in that case, the defendant, City of Kankakee, owed no legal duty to plaintiff's intestate other than to refrain from wilfully and wantonly injuring him, unless you find from the evidence that said defendant had or maintained at said time and place an attractive nuisance."

Count II of plaintiff's complaint was based upon negligence of the defendant in knowingly maintaining an extra hazardous and dangerous condition on the premises where children of tender years played. Defendant's instruction number three was aimed to eliminate recovery under Count II. Under the modern decisions, we find this to contain an incorrect statement of law. In Lumer v. Kepler, 411 Ill. 368, the court stated, "While it is generally true, as defendant contends, that infants have no greater rights to go upon the land of others than adults and their mere minority impresses no duty upon landowners to expect them or prepare for their safety, (Burns v. City of Chicago, 338 Ill. 89; McDermott v. Burke, 256 Ill. 401,) recognized exceptions exist where the landowner maintains an attractive nuisance on the premises, (Olesak v. Public Service Co., 342 Ill. 482; Stollery v. Cicero and Proviso Street Railway Co., 243 Ill. 290,) or even in the absence of a dangerous attraction, where the owner knows that small children customarily play on the property. In the latter situation, where an owner knows, or should know, that young children habitually frequent the vicinity of a defective structure

or dangerous agency existing on the land, which is likely to cause injury to them because they, by reason of their immaturity, are incapable of discovering the danger or appreciating the risk involved, and where the expense or inconvenience to the owner in remedying the condition is slight compared to the risk to the children, the duty devolves upon the owner to exercise due care to remedy the condition or otherwise protect the children from injury resulting from it."

This language is adopted by the Supreme Court in the case of Kahn v. James Burton Co., 5 Ill. 2d. 614. There the court concludes, "The element of attraction is significant only insofar as it indicates that the trespass should be anticipated, the true basis of liability being the foreseeability of harm to the child. Whether the lumber pile was sufficiently attractive to entice children into climbing upon it, whether its condition would involve danger from such activity, and whether the contractor should have anticipated the probability of the accident, were matters for determination by the jury."

Considering these cases the tendered instruction was improper and properly refused. The same can be said with reference to defendant's instruction number five. This instruction said in another way what was said in instruction number three. Under the authorities cited, it contained an incorrect statement of the law and also was properly refused.

We find no error and so the Circuit Court of Kankakee County is affirmed.

Judgment affirmed.

Dove, P. J. and McNeal, J., Concur

Dove, P. J. and McNeal, J., Concur

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NO. 11087 (Publish Abstract Only) Agenda 8

FILED

DEC 1 1957

PAUL V. WUNDERLICH
Clerk, Appellate Court, 2nd District

15 I.A.2d 459

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, SECOND DIVISION

October Term, A. D. 1957

DONALD YARGER and NATALIE YARGER, Plaintiffs-Appellants, vs. GEORGE SCHABACKER, Defendant-Appellee.	Appeal from the Circuit Court of McHenry County

PER CURIAM:

On May 1, 1955, the plaintiffs, Donald Yarger and Natalie Yarger, and the defendant, George Schabacker, made a written lease in which plaintiffs leased about fifty-five acres of vacant farm land for the balance of the year, and defendant agreed to pay $825.00 on or before November 1, 1955, as rent for the use of the land. On January 1, 1956, pursuant to plaintiffs' distress warrant, the sheriff of McHenry County levied on all corn growing on the premises. The corn was picked and sold and the net proceeds amounting to $313.14 deposited with the clerk of the circuit court to abide the outcome of the case. In his counterclaim defendant alleged that plaintiffs wrongfully evicted him from the premises when he attempted to harvest the corn, and as a result of such eviction the crop was depreciated and destroyed to his damage in the sum of $1000.00; also that on June 24, 1955, plaintiffs employed defendant to furnish labor and material to waterproof a building; that he did the work and furnished the material which was reasonably worth $350.00; and that plaintiffs failed and refused to pay him.

A jury returned verdicts finding the plaintiffs and the defendant not guilty. Plaintiffs' motions for judgment notwithstanding

the verdict and for a new trial were overruled. Judgment was entered on the verdicts and plaintiffs appealed. Appellee filed no brief in this court. Appellants contend that the verdict and judgment are against the manifest weight of the evidence.

Appellants' theory is that there was no statement by defendant in the pleading or the testimony that he has paid the rent which he agreed to pay or that it was not due the plaintiffs, and consequently they were entitled to a verdict in the amount of $825.00. This theory is supported by plaintiffs' abstract of record, because their abstract wholly fails to present any of the allegations contained in defendant's counterclaim, or any of his testimony in support of his claim of eviction and resultant damages, or his claim for work and material furnished to waterproof plaintiffs' building, or any of the testimony of defendant's witness, Erwin Arndt, corroborating defendant's claims. The record in this case contains all of the evidence, and under Appellate Court Rule 6, it was incumbent upon appellants to furnish an abstract presenting clearly and concisely the substance of all the evidence, especially where it is contended that the verdict was contrary to the manifest weight of the evidence. No sufficient abstract having been furnished, we are required to review the evidence as shown by the record.

Donald Yarger testified that he was engaged in the design and development of hydraulic pumps in a building adjacent to the land leased to defendant; that the leased land was used for no other purpose than raising corn; that about the middle of November he told defendant the rent should be paid before the crop was taken off the land or defendant should make some arrangement to pay the rent before he removed the crop; and that he received no rent from defendant for the use of the premises.

Defendant testified that Mr. Yarger requested him to rent the premises; that defendant replied that he would drive 25 miles to farm the land provided he could paint Yarger's building; that on June 24 he submitted an estimate to furnish and apply water-repellent to the building for $688.40; that he and his employee, Erwin Arndt, waterproofed two sides of the building in the first part of September; and that the reasonable charge

the verdict and for a new trial were overruled. Judgment was entered on the verdicts and plaintiffs appealed. [illegible] the trial court. Appellants contend that the trial [illegible] judgment are [illegible] the manifest weight of the evidence.

Appellants' theory is [illegible] in the pleading [illegible] to pay or that it was not due [illegible] entitled to a verdict [illegible] by plaintiffs' absence of [illegible] present any [illegible] any of his testimony [illegible] damages, or his claim [illegible] plaintiffs' building, or any of [illegible] Arndt, corroborating defendant's [illegible] all of the evidence, and [illegible] upon appeal this tribunal [illegible] the substance of all the evidence, especially where it is conceded that the verdict was contrary to the manifest weight of the evidence. No sufficient abstract having been furnished, we are restricted to review the evidence as shown by the record.

Donald Larger testified that he was engaged in the design and development of hydraulic pumps in a building adjacent to the land leased to defendant; that the leased land was used for no other purpose than raising corn; that about the middle of November he told defendant the rent should be paid before the crop was taken off; that defendant or defendant should make some arrangement to pay the rent before he removed the crop; and that he received no rent from defendant for the use of the premises.

Defendant testified that Mr. Larger requested him to rent the premises; that defendant replied that he would drive 25 miles to farm the land provided he could paint Larger's building; that on June 24 he submitted an estimate to furnish and apply water-repellent to the building for $688.40; that he and his employee, Irwin Arndt, waterproofed two sides of the building in the first part of September; and that the reasonable charge

for 42 gallons of Dri seal used and the work performed was $350.00. Defendant further testified that he planted Pioneer 349 corn in the land early in June; that he cultivated the corn twice; that about November 1 he opened up the field, picked 50 to 60 bushels from 2½ to 3 acres, and had the corn tested for moisture content; that it was a fair crop, ready to harvest and worth about $1500.00; that shortly thereafter he had a conversation with Mr. Yarger; that the first thing he said was: "get the hell off the place." Defendant tried to talk to Yarger--to tell him what he had in mind, and suggested that Yarger got up on the wrong side of the bed, but he said: "You just get the hell off my place and I am taking all of your equipment." Arndt was present at the conversation. Defendant did no more work in the field, but he noticed that the corn was dropping off the stalks late in December and that there was quite a little corn on the ground after the crop was harvested in January.

Erwin Arndt testified that he had been employed by defendant to do farm work, mix paint, and take care of his paint-spraying machine, for about four years; that in September he helped defendant paint two sides of Yarger's building; that he was present during the conversation early in November between Yarger and defendant; and that Yarger told them "to get the hell off the place and stay off." Defendant said that Yarger must have got up on the wrong side of the bed that morning. Yarger then said: "If you don't get off I will go into the shop and get five men to beat you to death, to beat you up." Defendant and Arndt got off the place and he never went back to the land again.

On rebuttal Mr. Yarger denied that he told defendant to "get the hell off" his land, or that he was holding defendant's equipment; or that he ever saw defendant's estimate or his bill for waterproofing the building. He testified that there were no stalks down when the corn was picked, and practically no corn on the ground after it was picked. Harold Bennecke testified that he picked and shelled 437 bushels of corn from the leased land in January, 1956; that he charged Mr. Yarger six dollars an acre or a total of $264 for picking and shelling the corn; that the stalks were standing in good condition when he picked the corn; and that there was not

for $2 gallons [illegible]

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On rebuttal [illegible] Harper testified [illegible]

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he ever saw defendant [illegible]

He testified that there were [illegible]

practically no corn on the ground after [illegible]

testified that he picked and shelled 27 bushels of corn from the leased land in January, 1926; that he charged Mr. Harper six dollars an acre or a total of $264 for picking and shelling the corn; that the stalks were standing in good condition when he picked the corn; and that there was not

much corn on the ground after picking.

According to the record, the court gave the jury eleven instructions which had been agreed upon and offered by both parties. In addition to instructions pertaining to the burden of proof, preponderance of the evidence, credibility of the witnesses, and the weight to be given their testimony, the jury was given instructions that it was the right and duty of the jury to determine all questions of fact; that in order to recover, defendant was required to prove the several allegations contained in his counterclaim; that in order to recover, plaintiffs were required to prove the following allegations: (1) that defendant was plaintiffs' tenant; and (2) that "defendant abandoned or removed from the premises" and wrongfully refused to pay the rent due; and that defendant denied these allegations and set up the defense that plaintiffs wrongfully deprived him of possession of the premises and prevented his harvesting the crop.

The eviction which will discharge the liability of a tenant to pay rent is not necessarily an actual physical expulsion from the premises. Any act of the landlord which deprives the tenant of the beneficial enjoyment of the premises constitutes a constructive eviction, which exonerates the tenant from the terms and conditions of the lease and he may abandon it. Auto. Sup. Co. v. Scene-in-Action Corp., 340 Ill. 196, 201. Acts of a grave and permanent character, which amount to a clear indication of an intention on the landlord's part to deprive the tenant of the enjoyment of the demised premises, will constitute an eviction. To evict a tenant, according to the original signification of the word, is to deprive him of the possession of the land. But the landlord, without being guilty of an actual physical disturbance of the tenant's possession, may do such acts as will justify or warrant the tenant in leaving the premises. If the tenant abandons the premises, then the circumstances which justify such abandonment, taken in connection with the act of abandonment itself, will support a plea of eviction as against an action for rent. Keating v. Springer, 146 Ill. 481, 495.

Whether the acts of the landlord amount to a constructive eviction is ordinarily a question of fact for the decision of a jury,

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to [illegible]

[illegible]

[illegible]

of [illegible]

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[illegible]

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possession of [illegible]

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[illegible]

[illegible]

[illegible]

[illegible]

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according to the original [illegible]

the possession of the land. [illegible]

actual physic[illegible] dispute[illegible]

[illegible] will justify or warrant the [illegible]

tenant abandons the premises, [illegible]

abandonment, taken in connection [illegible]

support a plea of eviction as against an action [illegible]

Springer, 146 Ill. 481, 495.

Whether the acts of the landlord amount to a constructive eviction is ordinarily a question of fact for the decision of a jury,

depending upon the circumstances of the particular case. Auto. Sup. Co. v. Scene-in-Action Corp., supra. In the instant case defendant's evidence showed that the landlord ordered the tenant off the premises and threatened him and his farmhand with physical violence, and that they never returned to the premises. The landlord denied that he ordered tenant off the premises, but it was for the jury to say which should be believed. The facts and circumstances in evidence in this case were sufficient to warrant the jury finding either that Yarger's threats constituted an eviction and justified defendant's abandonment of the premises and exonerated him from payment of the rent (Kastler v. Logg, 160 Ill. App. 411), or that neither party was entitled to recover from the other because the amount of rent due plaintiffs was equivalent to the damages sustained by defendant as a result of such eviction and plaintiffs' refusal to pay for work and material furnished by defendant.

A trial court may grant a judgment notwithstanding the verdict only when all of the evidence is considered, together with all reasonable inferences, and there is a total failure or lack of evidence to prove any necessary element of the case. The matter of granting a new trial is within the sound discretion of the trial judge, and his decision will not be reversed except for a clear abuse of discretion. Hulke v. International Manufacturing Company, 13 Ill. App. 2d 5, 46. In the instant case there was evidence to support the jury's verdicts and the trial court properly denied plaintiffs' motions for judgment notwithstanding the verdict and for a new trial.

It is not the province of this court to substitute its judgment for that of a jury unless the verdict is against the manifest weight of the evidence. To be against the manifest weight of the evidence requires that an opposite conclusion be clearly evident (Ritter v. Hatteberg, 14 Ill. App. 2d 548, 555). We cannot say that the verdicts rendered by the jury in this case were contrary to the manifest weight of the evidence. Therefore the judgment of the Circuit Court of McHenry County will be affirmed.

Judgment affirmed.

Judgment affirmed.

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47075

15 I.A. 2-1 533

EDMOND NAGLE, Appellee, v. CITY OF CHICAGO, a municipal corporation, Co-party-Appellant and MICHAEL PONTARELLI, INC., a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury and property damage suit. Verdict and judgment were for plaintiff against both defendants for $1500. Defendants have appealed.

On May 25, 1955, defendant Pontarelli Corporation, called Pontarelli herein, was constructing a sewer in Bloomingdale Avenue, in Chicago, and had excavated a hole 20 feet long, about 18 feet wide and 27 feet deep across Central Avenue. The east side of the excavation was bridged with two decks, each 38 feet long and 14 feet wide, of steel beams to carry north and southbound traffic, one lane for each, in Central Avenue. There were no bridges across the west half of Central Avenue and it was completely closed to traffic. About 12:15 that morning plaintiff was driving his car south in Central Avenue and ran into the hole.

Plaintiff alleged his due care; the giving of statutory notice; the duty of the city and its contractor, Pontarelli, to safeguard the excavation in the intersection

so as to protect the public using the streets; the failure of both defendants to perform the duty by proper barricades or lights; the resultant dangerous condition of which the city had notice; and the consequent injury to plaintiff and damage to his car. Defendants made issue of all allegations though the city admitted that Pontarelli was its contractor making the sewer excavation in Central Avenue on May 25, 1955.

The questions raised here are whether the court erred in denying motions for directed verdict and for judgment notwithstanding, and whether there was prejudicial error in plaintiff's argument to the jury.

Under the first question both defendants argue here that plaintiff failed as a matter of law to prove due care, and the city argues that there is no evidence of negligence on the part of the city or notice to the city of a dangerous condition. On this question we take only the evidence favorable to the plaintiff and draw the legal inferences most strongly in his favor (Hunter v. Troup, 315 Ill. 293; Mahan v. Richardson, 284 Ill. App. 493) to decide whether there is any evidence to prove due care, the city's negligence and its notice of the danger.

The favorable testimony is that plaintiff drove southward down a viaduct, over railroad tracks north of Bloomingdale Avenue, and noticed "little flare" lights dividing the highway; that he slowed down to 15 miles per hour and as he descended the "steep grade" saw no barricades; that when 50 feet from the bottom of the "hill" he noticed

so as to protect the public using the streets; the failure of both defendants to perform the duty by proper barridades or lights; the resultant dangerous condition of which the city had notice; and the consequent injury to plaintiff and damage to his car. Defendants made issue of all allegations though the city admitted that Pontarelli was its contractor making the sewer excavaction in Central Avenue on May 25, 1955.

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"nothing"; and that when he reached the bottom at 10 miles per hour he saw the excavation about 15 feet away, applied his brakes and skidded into the "hole." There is also testimony that trucks "loaded with" dirt and gravel traversed the west side of Central Avenue and testimony that the road was wet at the time of the accident. There is testimony, too, that the watchman at the excavation went off duty at 12 midnight.

On this testimony we think that reasonable men could differ on the question of plaintiff's due care. A reasonable inference could be drawn from that testimony that the "little flares" dividing the highway were not enough to cause him to reduce his speed more than he did, or to attempt to swerve from his path before he was 15 feet from the "hole," or to have seen the "hole" earlier or to have applied his brakes quicker.

We think, too that reasonable men could differ on the question of adequacy of the protection given motorists driving south on Central Avenue. There was no watchman on duty, no barricade that plaintiff saw and "little flares" which gave plaintiff no notice of the dangerous excavation. The jury could reasonably infer that defendants should have anticipated that these inadequacies were likely to result in danger to motorists who, like plaintiff, were rightly driving south on Central Avenue.

This conclusion disposes of the claim that there was no evidence of notice to the city. Taking the favorable

evidence as true, the city plainly had notice that the precautions taken were inadequate. This distinguishes Jochens v. City of Chicago, 6 Ill. App.2d 144. There the question was whether a temporary beacon, replacing a permanent beacon destroyed the previous day, was "connected" and whether the city had notice that the temporary beacon had ceased to operate before the accident subject of suit. There was no question there, as there is here, whether the warning signal was adequate.

We think the case was properly submitted to the jury. Our conclusion is supported by our decision in Nagel v. Village of East Hazelcrest, 347 Ill. App. 338 in which we held that the case is for the jury where there is evidence from which an inference could be drawn that the city had not taken adequate precautions in warning passing motorists of the dangerous condition of a street.

The case of Dee v. The City of Peru, 343 Ill. 36, is not pertinent. On the evidence favorable to plaintiff it cannot be said here, as the Supreme Court said there, that "if he had properly exercised his sight, he would have seen" the excavation. In Jones v. City of Chicago, 296 Ill. App. 641, the judgment was reversed and cause remanded on the ground that the verdict was against the manifest weight of the evidence. That ground is not urged here. In Ebert v. City of Chicago, 324 Ill. App. 315, a judgment for the city notwithstanding the verdict for the plaintiff was affirmed as there was no evidence of actual or constructive notice. That fact distinguishes Ebert and the instant case. On the

favorable evidence here the plaintiff did not see barricades and was not warned of the excavation until too late to stop on the slippery street; and the city should have known the precautions were inadequate.

At the trial plaintiff's attorney was examining Pontarelli's engineer and asked whether the engineer had watched the work being done under Pontarelli's contract with the city. The engineer answered "no" and said he was furnished with a copy of the contract. He identified a copy and plaintiff offered the copy in evidence. The city had no objection to its reception but Pontarelli's attorney made a general objection then later objected on the grounds that plaintiff was not a party to the contract and that the original was not introduced and that no foundation had been laid for introduction of the photostat. Subsequently, the city offered the original contract, and, to this introduction, Pontarelli's attorney made a general objection. The city's attorney then read to the jury two provisions of the contract with respect to Pontarelli's duty to protect the public. Pontarelli's attorney objected apparently on the ground that the two provisions were being read out of context of the entire contract. We conclude that the court's ruling on admission of the contract was not error.

In his closing argument to the jury, plaintiff's attorney told the jurors that if they wanted to "stop and read" the contract they would find that the "money will not come out of your taxes anyway, because there is a provision

in the contract that provides for an indemnity." Defendants moved to withdraw a juror and for the declaration of a mistrial. The court denied the motion on the ground that, since the contract was in evidence, the jury would know of the indemnity provision and the argument was not prejudicial error.

So far as the record shows no effort was made by motion or instruction to have the jury's consideration limited to ~~any~~ the provisions of the contract respecting protection of the public. The court instructed the jury that it should find both the city and Pontarelli not guilty if the jury believed from the evidence that the work was being carried on with "reasonable regard to the interest and safety of the public." The jury found both defendants guilty. There is no claim the verdict was against the manifest weight of the egidence or was excessive. For these reasons we conclude neither defendant was in the position to complain of the court's ruling on the argument, and that no prejudice is shown as a result of the challenged argument. We cannot say here as the court said in City of Chicago v. Wright and Lawther Oil and Lead Mfg. Co., 14 Ill. App. 119, cited by Pontarelli, that the "inevitable tendency" of the argument was to make the jury "less circumspect in estimating the actual loss occasioned by the injury. . . ." City of Chicago v. Wright and Lawther Oil and Lead Mfg. Co., supra, 124.

There is no merit to the complaint of the city that the court committed reversible error in failing to give the instruction with respect to notice to the city of removal, destruction or striking down of the barricades. The issue was upon "proper barricades" and this involved the question of warning lights. The instruction was accordingly incomplete and likely to mislead.

For the reasons given the judgment is affirmed.

AFFIRMED.

FEINBERG, J., CONCURS.

LEWE, J., CONCURS.

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46991

15 I.A. 2d 534

RAYMOND E. TRAFELET, Appellee, v. M & C MOTORS, INC., a corporation, CHARLES UGASTE, JOHN UGASTE, BLUE CAB COMPANY, a corporation, and SAFETY MAINTENANCE AND SALES COMPANY, a corporation, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a suit in equity by an attorney to establish his part ownership of a number of business enterprises and for an accounting. The issues were referred to a master whose report and recommendations were approved by the chancellor. A decree in plaintiff's favor was entered and an accounting ordered. The defendants have appealed. We shall refer to the corporate defendants as M & C, Blue Cab and Safety Maintenance; to Radio Cab Company, as Radio Cab; to General Finance Company, as General Finance; and to Charles Ugaste, as Ugaste.

Plaintiff, as attorney, was associated with Ugaste in the acquisition in 1938 of the Radio Cab in Evanston, Illinois. Plaintiff held 1 share of the stock, John Ugaste 1 share and Ugaste 198 shares. The following year the M & C Company in Chicago was acquired and the stock held in the same proportions. In the latter part of 1941, the assets of Radio Cab were sold and a new garage purchased to house M & C. In January, 1944, new stock certificates were issued representing 100 shares of M & C for plaintiff, 100 shares

for John Ugaste and 100 shares for Ugaste. In 1944 these certificates were pledged as collateral with the General Finance to secure a note of $38,160, the proceeds of which were used to apply upon the $65,000 purchase price of the Blue Cab and Safety Maintenance of Oak Park, Illinois. Also in 1944 a DeSoto agency in Glen Ellyn, Illinois, was acquired and reorganized in the name of Du Page Motor, Inc. In 1948 the stock of Du Page Motors was held by Ugaste and Edward C. Meyers, a former M & C employee, in equal shares. In September, 1950, Meyers purchased the stock held by Ugaste for $53,500. Ugaste retained the proceeds from this sale. The stock certificates which were pledged with General Finance and which were turned over to Ugaste when the loans were repaid in June, 1946, were also retained by him. Plaintiff brought suit in July, 1952, claiming an ownership interest in the M & C, Blue Cab, Safety Maintenance and in the proceeds of the sale by Ugaste to Meyers of the Du Page Motors stock.

The master found plaintiff was the legal and equitable owner of one third interests in M & C, Blue Cab and Safety Maintenance; that the stock certificates representing those interests had been issued to him for a valuable consideration pursuant to agreements between him and Ugaste; and that plaintiff was a beneficial owner of one fourth of the stock of Du Page Motors and Ugaste constructive trustee of plaintiff's share of the sales price of the stock.

Defendants contend that plaintiff, as attorney, was a fiduciary of Ugaste bound to absolute loyalty; that he failed to show full disclosure to his client in

the transactions on which his suit rests; and that he has failed to meet his burden as fiduciary by showing that the several transactions with Ugaste were fair and equitable. The master found that though Ugaste had no formal education beyond sixth grade, he was a practical businessman whose agreements with plaintiff were not the result of his "complete reliance" on plaintiff; and that plaintiff's interest in the enterprises was not a result of the latter's abuse of his fiduciary relationship.

Defendants' arguments are not convincing on this point. They do not say in what respect, specifically, plaintiff failed to fulfill his duty as fiduciary. They say that he failed to apprise Ugaste of the legal consequences flowing from "the execution of the various documents, stock certificates and other written instruments"; that "no consideration was given to the fairness or lack thereof in any of the specific transactions..."; and that the record showed "an active desire on plaintiff's part to protect and advance his own interests at the expense of his clients." The master found in plaintiff's attitude in his relationship with Ugaste a lack of aggressiveness and a timidity rather than the attitude claimed by defendants. The record supports the master's view.

There is no dispute about the rules guarding clients against the overreaching by attorneys. Where an attorney and his client enter into a business venture, the attorney has the burden of showing the fairness of the transaction.

Masters v. Elder, 407 Ill. 512, 520. This burden is sustained where it is shown that the transaction was entered into by the client voluntarily, deliberately and advisedly. Rose v. Frailey, 10 Ill. 2d. 514, 516. However, the attorney need not show that the client had independent legal advice as long as he shows that the transaction is fair and was entered into with complete understanding on the part of the client. Zeigler v. Illinois Trust and Savings Bank, 245 Ill. 180, 197.

We believe that the master's findings that the plaintiff is the "legal and equitable owner" of certificate number 10 for 100 shares of common stock of M & C, certificate number 3 for 33-1/3 shares of common stock of Blue Cab, certificate number 13 for 216-2/3 shares of common stock of Safety Maintenance is supported by clear and convincing proof and that such proof shows the fairness of the various transactions entered into between the parties.

The master found that Meyers purchased the 50 per cent interest in DuPage Motors for $53,500 and that Ugaste held $26,750, representing plaintiff's 25 per cent interest, as constructive trustee for plaintiff. The evidence, however, is uncontroverted that Meyers paid $25,000 for the 50 per cent interest. The decree overruled, "in all things," the exceptions to the master's report, adopted the findings and "in all things" approved and confirmed the report. The decree, however, makes no reference to this finding and makes no specific order upon plaintiff's claim with respect to

DuPage Motors. Ugaste states that the chancellor "modified the decree to reserve final ruling upon this phase of the case to the accounting."

Though there is conflicting testimony as to the M & C acquisition and its ownership, we feel that there is clear and convincing proof supporting plaintiff's version. Griffing testified that the $1800 needed to make the purchase was not readily available and that it was finally borrowed from the Uptown Finance Corporation after negotiations with McKernan, the agent of the finance company. McKernan testified that he made the $1800 loan for the purchase of M & C.

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Though there is conflicting testimony as to the M & C acquisition and its ownership, we feel that there is clear and convincing proof supporting plaintiff's version. Griffing testified that the $1800 needed to make the purchase was not readily available and that it was finally borrowed from the Uptown Finance Corporation after negotiations with McKernan, the agent of the finance company. McKernan testified that he made the $1800 loan for the purchase of M & C.

Furthermore, Ugaste himself testified, "I wouldn't say I didn't get $1800 from McKernan about the time I took over M & C Motors." The record shows that once M & C was acquired there was still a problem of financing its operation. The plaintiff testified that his car was turned into M & C at Ugaste's request in order to meet this problem. This testimony was supported by the testimony of both Griffing and Erickson, a district manager for the DeSoto Division of the Chrysler Corporation who was largely responsible for the M & C transaction and its subsequent agency. Griffing testified that plaintiff's car was "floor-planned" for around $600 and the money used by M & C. Erickson testified that Ugaste told him that "they had sold the lawyer's car for $750 and had used that money in the business." Finally, Ugaste's theory that plaintiff exchanged his car and acquired ownership of a new car is upset by his own testimony that he eventually "went out and got" the "company" car without plaintiff's consent or knowledge.

Griffing stated that the plaintiff was told while the three of them were negotiating the purchase of M & C that "he would be taken in on the deal." Erickson testified that Ugaste told him that the "lawyer was a third owner...." Furthermore, the master's finding for the plaintiff on this issue of ownership is substantiated by the eventual issue of M & C stock to Ugaste, John Ugaste and plaintiff in equal shares. The ultimate division of

the stock in which plaintiff was given a one third ownership would be the normal sequence not only from the evidence related above but also from the facts in the record which show that plaintiff obtained from his brother-in-law a mortgage on the garage which later housed M & C; that his only compensation during this period was $15 per week; and the fact that the record indicates, if it does not conclusively show, that plaintiff helped Ugaste made a success of the M & C enterprise.

The record leaves no room for any inference whatever of any unfairness on the part of plaintiff with respect to Ugaste in the M & C, Blue Cab and Safety Maintenance transactions. The M & C is the key transaction and must be viewed as it was in 1939 when it was acquired for $1800. The testimony does not show clearly who made the loan, whether it was Radio Cab, Ugaste, or Ugaste, Griffing and plaintiff. It does show that the latter three were with Mr. McKernan when the money was paid over. McKernan says that he "loaned the $1800 to the company which was for the purchase of M & C Motors, Inc., as I remember." This "company" would be Radio Cab.

That consideration aside, it is clear that plaintiff's car was sold and the proceeds went into the business. Thus even if Ugaste, himself, were the sole borrower of the $1800 original investment, plaintiff's investment, the only personal cash investment made in the transaction, is the

foundation and confirmation of Ugaste's statements that plaintiff had a one third interest at the time, and the basis for issuing plaintiff a certificate for one third of the stock subsequently.

Plaintiff's investment went beyond any call of duty as attorney. It indicates an intelligent estimate of the potential business skill of Ugaste and plaintiff's faith in the joint enterprise. Moreover, subsequently plaintiff was responsible for obtaining the $10,000 mortgage which enabled M & C to purchase its new M & C garage. Plaintiff's M & C stock, in the same amount and to the same extent as the Ugastes, was used as collateral to secure the funds for acquisition of Blue Cab and Safety Maintenance. The agreement of sale states that Ugaste purchased Blue Cab and Safety Maintenance "on behalf of himself and others...." He was obligated to the same extent as the Ugastes for repayment of the loan. He participated in the negotiations from the beginning and worked out the consummation of the deal. He served as president of Blue Cab and, in the role of attorney, served as its labor relations counsel.

Similarly with Du Page Motors: Plaintiff's M & C stock, as well as the Ugastes, was collateral for the original $2000 as well as the $10,000 subsequently invested. He participated in the negotiations and aided in consummating the deal.

The record also discloses that at the outset of the joint enterprise Ugaste was a mechanic, with little, if any, education. The inference is clear from all the testimony

that he was not sure of himself at the outset and needed the help and ability of plaintiff to guide him and to be a part of the M & C enterprise. The venture was at first highly speculative. No one could foretell what success there ultimately would be. Plaintiff was willing to speculate. He contributed not only his time and effort but his money as well. The record is not consistent with plaintiff in the role of a $15 per week attorney. There is convincing support of the theory of plaintiff's ownership, acquired in fairness, in M & C which carried over, also in fairness, into Blue Cab, Safety Maintenance and Du Page Motors.

Where a master has heard the evidence and made findings of fact which are approved by the chancellor, this court will not disturb those findings unless they are against the manifest weight of the evidence. Schwartzentruber v. Stephens, 8 Ill.2d 222. We cannot say that these ultimate findings of the master with respect to plaintiff's interests in M & C, Blue Cab and Safety Maintenance and Du Page are against the manifest weight of the evidence. Nor can we conclude that the master made his findings upon a "mere preponderance" or that the master and chancellor inverted the burden of proof in the case to the prejudice of defendants.

Documentary evidence is relied upon by defendants to show inconsistencies in plaintiff's version of his stock ownership in M & C, such as the income tax returns reflecting stock interests in the company. These tax returns, however,

are explained away by plaintiff's testimony and by other exhibits in the record. For instance, the income tax returns for the years 1941, 1942, 1943 and 1944 show plaintiff's ownership as one share; but General Finance, in 1944, received certificate number 10 for 100 shares of M & C in plaintiff's name. There is an apparent mystery why Griffing, witness for plaintiff, made no claim through the years for the third interest he was to have in M & C. We cannot say the master was wrong in finding that charges of misconduct in working for Ugaste posed a dilemma for Griffing which the latter resolved by abandoning any claim.

Defendants further claim that plaintiff's suit is barred by "gross laches and by limitations." They argue that plaintiff's claim arose in 1939 and became fixed at the latest in 1946 when General Finance turned over the pledged stock to Ugaste; and that the suit filed in 1952 was too late and worked a disadvantage to defendants by reason of testimony made unavailable by the delay. The record shows that some of the documentary evidence was unavailable as early as 1942; that one possible witness was lost track of in 1943; and that another's importance was not suggested.

Plaintiff testified that he was informed in 1948 that General Finance had the certificate and that he did not learn of the conversion by Ugaste until 1952. His testimony was corroborated by credible evidence. Plaintiff insists that Ugaste concealed the fraud from plaintiff until 1952 when it was discovered by the latter for the first time.

There is room for the inference that Ugaste deliberately concealed from plaintiff knowledge that Ugaste had converted the certificates. The record shows that plaintiff's employment as defendants' attorney ended in 1949, and plaintiff testified that in 1949 Ugaste spoke to him about an exchange of plaintiff's interests in the companies but that Ugaste did not tell him of the M & C stock conversion. We think that the record supports the conclusion that the fraud was not discovered until 1952 and that the suit is not barred by reason of his delay in asserting his claim.

Defendants also contend that plaintiff's suit should be barred because of the latter's unclean hands. It is enough to say of this contention that there is no evidence that plaintiff's hands were unclean with respect to defendants in the transactions involved in this suit. (See Evangeloff v. Evangeloff, 403 Ill. 118, 126.)

We have examined findings number 6, 9, 20 and 25 against the claim made. We find only an inconsequential error in number 9 and no error in the other findings. The master's report does not come within the rule in Jonew v. Koepke, 387 Ill. 97, relied on by defendants, and the report should stand.

For the reasons given, the decree is affirmed.

AFFIRMED.

FEINBERG, J. CONCURS.

LEWE, J., TOOK NO PART.

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15 I.A. 2d 535

47087

BASIL KAPAS, Appellant, v. MATTIE ANDERSON and CORRINE POLLARD, Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

This action was brought upon a note in the sum of $2317.99. Upon a hearing by the court without a jury, the court entered judgment for $43.83 in favor of plaintiff. Plaintiff appeals and complains the judgment should have been for a larger amount. The judgment order recites that the court heard evidence. The evidence is not preserved by a report of proceedings, and we are bound to assume that the evidence justified the judgment. Under the Practice Act it is incumbent upon the party complaining to preserve the evidence. Lukas v. Lukas, 381 Ill. 429; Ferro v. Daros, 343 Ill. App. 267; A.B.C. Loan Co. v. Campbell, 1 Ill. App. 2d 297.

Plaintiff contends that the record discloses the court stated all the evidence in rendering its decision. The record does not bear out this contention. It discloses that the court merely gave its reasons for its conclusion, and also said that it was "basing its conclusion on the evidence produced at the hearing, plus the intentions that were reflected in the note."

In the absence of a report of proceedings there are no questions presented upon this appeal, and the judgment is therefore affirmed.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

October Term, A. D. 1957.

15 I.A. 536

General No. 10139 | Agenda No. 9

Louis Danner, Plaintiff-Appellee, vs. Board of Fire and Police Commissioners of the City of Danville, Illinois, William Hartshorn as Chairman, W. H. Kamille as a Member and Ray G. Roberts as Secretary of the Board of Fire and Police Commissioners of the City of Danville, Illinois, the City of Danville, Vermilion County, Illinois, a Municipal Corporation, Defendants-Appellants.	Appeal from the Circuit Court of Vermilion County.

REYNOLDS, J.

This is an action under the Administrative Review Act, brought by the plaintiff-appellee Louis Danner, for review of an order of the Board of Fire and Police Commissioners of the City of Danville, Illinois, finding Louis Danner guilty of

conduct tending to destroy the good order and efficiency of the Police Department of the City of Danville, and ordering him permanently suspended from duty as a policeman. The cause was heard by the Circuit Court of Vermilion County on review of the Board's action and order, and the Circuit Court reversed the Board's order on the ground that it was against the manifest weight of the evidence. From the order of the Circuit Court, the cause comes to this court.

On September 7, 1956, Darrell Wehmeyer was assaulted in front of or near the home of Louis Danner. Mrs. Betty Ervin had requested Wehmeyer to take her to the Danner home to look for her husband, having been told that her husband might be with the Danners. Wehmeyer was driving with Mrs. Ervin and her sister Naomi Carl beside him in the front seat. As Wehmeyer drove up to the Danner home, Bob Danner, a brother, came out, got into his car, switched on his lights, started up and forced the Wehmeyer car up on the lawn of the home across from the Danner home. A few moments later the altercation arose. Why or for what reason Wehmeyer was assaulted was not shown by any of the evidence in this cause. While the altercation was going on, Mrs. Ervin got out of the car and ran to the home of Marvin Isenhower, who lived just across the street from the Louis Danner home, and asked Mrs. Isenhower to call the police. While still on the Isenhower property, Mrs. Ervin was assaulted by a sister of Louis Danner, Mrs. Roy Huggles. The reason for the trouble between Mrs. Ervin and Mrs. Huggles is not explained anywhere in the evidence.

conduct tending to destroy the good order [illegible]
the [illegible] department of the city [illegible]
[illegible] officer
[illegible] the case
was based [illegible]
of the door [illegible]
the [illegible]
weight [illegible]
the [illegible]

[illegible]
front of [illegible]
[illegible]
for her [illegible]
with the [illegible]
her side [illegible]
[illegible]
[illegible]
[illegible]
across fro[illegible]
[illegible]
[illegible]
while the [illegible]
the car [illegible]
just [illegible] the [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
between [illegible]
in the evidence.

On September 10, 1956, sworn charges were filed by Wehmeyer and Mrs. Ervin with the Board of Fire and Police Commissioners of the City of Danville, charging Louis Danner with the assault, beating and injury of Wehmeyer. Notice of a hearing on the charges was given by the Board, a copy of the charges given Danner, and on September 28, 1956, the hearing was held. Danner was present represented by counsel. Objection was made on behalf of Danner to the hearing on the grounds that the charges were not delivered to the Board through the Chief of Police and to the appearance of special counsel for the Board. Both the objections were overruled. Only the two complaining witnesses were allowed to testify, and although it appears that there were other eyewitnesses, the Board sustained objections to the testimony of these witnesses, on the ground that their names had not been given to Danner prior to the hearing.

Mrs. Ervin testified positively that Louis Danner pulled at Wehmeyer in his car and assaulted him by beating him about the neck and face. She testified that she had known Louis Danner for about four years, and further identified him in open court as the man she saw commit the assault upon Wehmeyer.

Wehmeyer testified that he had known Louis Danner for about eight months, by sight only. He also identified him in open court as the one who committed the assault upon him.

On September 10, 1963, [illegible] charges were filed by
[illegible]meyer and Irvin with the [illegible] file [illegible] [illegible]
Commissioners of the City of [illegible], charging [illegible] Armor
with the assault, battery [illegible] injury of [illegible]. Notice of
a hearing on the charges was given by [illegible], copy [illegible]
the charges given [illegible], [illegible] the
hearing was held. [illegible] [illegible]
Objection [illegible] the [illegible] the
grounds that the [illegible] [illegible] the [illegible]
through the [illegible] [illegible]
counsel for [illegible] [illegible]
[illegible] the [illegible] [illegible] testify,
and although [illegible] [illegible]
the lady [illegible] [illegible]
witnesses, on the [illegible] [illegible] over [illegible]
to Director [illegible].

Irvin testified [illegible] [illegible]
at Armoyer in [illegible] [illegible] [illegible]
the nook and face. [illegible] [illegible]
Armor for [illegible] [illegible]
open court as the [illegible] [illegible] [illegible].

Armoyer testified that [illegible] Armor for
about eight months, by fight only. [illegible] also identified him
in open court as the [illegible] who committed the assault upon him.

Both Mrs. Ervin and Wehmeyer testified that during the time the beating was taking place, Louis Danner was cursing and threatening Wehmeyer.

The witnesses in behalf of Louis Danner were himself, his brother Bob Danner, his brother-in-law Roy Ruggles, his sister Mrs. Roy Ruggles, his wife, Mrs. Louis Danner and Mr. and Mrs. Marvin Isenhower, neighbors.

Robert Danner testified that Roy Ruggles and not Louis Danner was the one who was assaulting Wehmeyer; Louis Danner was about ten feet from his front door when the Wehmeyer car pulled away; he tried to get Ruggles to quit and was trying to pull him away when the Wehmeyer car took off down the street. Robert Danner further testified that Louis Danner did not participate in the altercation at any time; that he did not come any closer than halfway to the street, and that he did not use any profane language. He further identified Mrs. Ervin and Naomi Carl who were riding with Wehmeyer, as sisters of his wife and that at the time of the assault, he was separated from his wife.

Mrs. Ruggles, the sister, testified that she heard the commotion, and went out to see what was going on; at that time her brother Louis was in the bathroom; she did not see her brother Louis at any time assault Wehmeyer; that she did not see him beat Wehmeyer, and did not hear him use any vile or profane language. She admitted getting in a fight with Betty Ervin.

Mrs. Louis Danner testified her husband went into the bathroom to take a bath, and that she heard the water turned on; she was in the bedroom and Louis Danner was still in the bathroom when she heard a scream; she went outside and saw something going on at the Wehmeyer car. When she got out there she saw her brother-in-law Ruggles at the car and that the door was open. She met her brother-in-law Bob Danner in the middle of the street; Louis Danner did not come over or participate in the fracas in any way, and that he did not commit any assault and did not use any vile language. She testified further that when she came back across the street, she saw her husband standing outside the house in his yard.

Roy Ruggles testified that he was the one who came in physical contact with Wehmeyer, and denied that Louis Danner touched Wehmeyer or that Danner used any vile or obscene language at any time. After admitting that he laid his hands on Wehmeyer, the witness on advice of counsel refused to answer any further questions about the assault.

Both the Isenhowers testified that they saw the fight between the two women. Mr. Isenhower could not identify the two women fighting on his porch but did say he could see Louis Danner standing near his yard, about half way between his house and the curb. Both of the Isenhowers testified that they did not see Louis Danner assault anyone, or use any vile language.

Louis Danner testified that he did not know Wehmeyer, had never seen him; he knew Betty Ervin, the sister of his brother Bob's wife; he was taking a bath when the trouble started; he heard a cry outside, more or less a scream, and that he put on sandals, pants and a tee shirt, and went to the front door. He testified that he noticed scuffling across the street between two women. Mrs. Louis Danner and Bob Danner went across the street to separate the women. He told them to come back and get in the house. He got half way across and by that time his brother had broken up the fight. He at no time saw Wehmeyer, did not know him, did not assault Wehmeyer or anyone, and did not use any vile language or threaten anyone.

While the identity of the assailant of Wehmeyer is disputed, certain other matters are undisputed.

1. The trouble took place in front of or near the home of Louis Danner.
2. The brother Robert Danner drove his car so as to force the Wehmeyer car up over the curb and on the lawn.
3. Wehmeyer was assaulted and abused.
4. Mrs. Betty Ervin was assaulted on the Isenhower porch.
5. Louis Danner, a police officer made no arrests or reports of any disturbance.

This is not a matter of a mistake. One group of witnesses or the other is not telling the truth. The two complaining witnesses, Darrell Wehmeyer, and Betty Irvin, are positive in their identification of Louis Danner as the assailant. They say they know him. They testify he was the assailant.

To the contrary is the testimony of Louis Danner, his wife, his sister, his brother-in-law, his brother, and two neighbors. The neighbors, the Isenhowers, are not so positive that Louis Danner did not commit an assault, but they did not see him do so. Huggles, the brother-in-law says he is the one who committed the assault, but refuses to say further than that on advice of counsel.

If the method of determining the truth of any disputed matter was by counting the number of witnesses on one side and balancing them against the number on the other side, the method would be simple. The preponderance of the evidence would be on the Danner side. But numbers of witnesses are not the sole determining factor in cases of this kind.

The Board of Fire and Police Commissioners of the City of Danville, sat as a jury in this cause, to determine whether or not the charges against the policeman, Louis Danner, were true or false. They had the duty to sift the truth from the falsehood and the facts from the misrepresentation. They had to consider not only the evidence of the witnesses, but their

This is not a matter of a mistake. One group of witnesses or the other is not telling the truth. The two complaining witnesses, Darrell Lemmeyer, [illegible] Evil, are positive in their identification of Louis Dunor as the assailant. They say they know him. They identify [illegible] as the [illegible].

In the contrary [illegible] of Louis Dunor's [illegible] wife, his sister, his brother-in-law, [illegible] neighbors. The neighbors, [illegible] positive that Louis Dunor did not [illegible], and that they [illegible] see him do so. Moreover, the brother-in-law says [illegible] who committed the assault, but returned to [illegible] that on advice of counsel.

In the matter of determining the truth [illegible] matter was by [illegible] and balancing them as [illegible] method [illegible] would be [illegible] not the sole determining factor [illegible].

The board [illegible] of Danville, set [illegible] or not the charges against the officers, [illegible] true or false. They had the duty to [illegible] the falsehood and the facts from the [illegible]. They had to consider not only the evidence [illegible] their

conduct, demeanor or bearing while testifying on the stand; their purpose or designs, if any, in so testifying; the likelihood of the truth of their testimony and many other factors. The Board found him guilty and ordered him permanently suspended from duty as a policeman.

This decision was reversed by the Circuit Court of Vermilion County, that court holding that the decision of the Board of Fire and Police Commissioners was against the manifest weight of the evidence.

The case of Brezner v. Civil Service Com., 398 Ill. 219, is relied upon by the plaintiff-appellee in support of the action taken by the Circuit Court. In that case, the findings of the Civil Service Commission were reversed for the reasons that the order of the hearing board, as adopted by the commission, was against the manifest weight of the evidence, was not supported by substantial evidence in the record, and did not conform to the evidence in the cause. In the case of Brown Shoe Co. v. Gordon, 405 Ill. 384, the evidence was far from clear and convincing and the Court in that case held that the reviewing court has a duty to review the proceedings, and, if the findings are against the manifest weight of the evidence, to set aside the decision. The doctrine as set out in those two cases is, in the main, the same rule for review of other cases, whether it be the decision of a judge or jury. If the decision is against the manifest weight of the evidence, it

should be reversed. This brings up the matter of how the weight of the evidence shall be arrived at in administrative agency hearings. As we have said it is not by numbers alone. In the case of Gump Co. v. Industrial Com., 411 Ill. 196, the Court there said:"...the Industrial Commission, under our statutes, has the primary function of determining facts. (deCarrion v. Industrial Com. 370 Ill. 474.) It must hear and judge the credibility of the various witnesses, sift the evidence, determine where the preponderance of the evidence lies, and then, upon such determination, render its decision. (Crepps v. Industrial Com. 402 Ill. 606.) We are not entitled to disturb a decision of the Industrial Commission unless such decision is manifestly against the weight of the evidence or has no substantial foundation in fact." And in the same case, on page 199, the Court continuing, said: "It is not necessary to dwell at length on the various conflicts to be found in the evidence given by the witnesses at the hearings. The controlling factor is that there is a conflict in the evidence. It goes without citation of authority that under our law the weight of the evidence does not depend on the number of witnesses testifying or the amount of evidence compiled. Our theories are built on a more widespread foundation. The little differences in speech, the carriage, the tone of voice and many other factors which cannot be contained in the dry printed words of a transcript also have bearings on the decision. These factors can only be of weight to the person

[illegible]

APPELLATE COURT

THIRD DISTRICT

OF ILLINOIS.

Louis Danner, Plaintiff-Appellee, vs. Board of Fire and Police Commissioners of the City of Danville, Illinois, William Hartshorn as Chairman, A. H. Kamille as a member and Ray G. Roberts as Secretary of the Board of Fire and Police Commissioners of the City of Danville, Illinois, the City of Danville, Vermilion County, Illinois, a Municipal Corporation, Defendants-Appellants.	)	Appeal from the Circuit Court of Vermilion County Gen. No. 10139

The Court having considered the Petition for Rehearing filed by the Plaintiff-Appellee in the above entitled cause, and being now sufficiently advised of and concerning the premises, it is ordered that the opinion filed in said cause on December 19, 1957, be and the same is hereby modified by striking pages 10, 11, 12, 13 and 14 and inserting in lieu thereof pages 10, 11, 12 and 13 attached hereto, and it is ordered that said Petition be Denied.

C. Ross Reynolds

Burton A. Roeth

William M. Carroll

Justices

APPELLATE COURT

THIRD DISTRICT

OF ILLINOIS.

Louis Danner,	Appeal from the
Plaintiff-Appellee,	Circuit Court of
vs.	Vermilion County
Board of Fire and Police Commissioners of the City of Danville, Illinois, William Herbstrom as Chairman, A. W. Kunzle as a member and Jay C. Roberts as Secretary of the Board of Fire and Police Commissioners of the City of Danville, Illinois, the City of Danville, Vermilion County, Illinois, a Municipal Corporation,	Gen. No. 10,[illegible]
Defendants-Appellants.	

The Court having considered the Petition for Leave to [illegible] filed by the Plaintiff-Appellee in the above entitled cause, [illegible] being now sufficiently advised of and concerning the premises, it is ordered that the opinion filed in said cause on December 19, 1957, be and the same is hereby modified by striking pages 10, 11, 12, 13 and 14 and inserting in lieu thereof pages 10, 11, 12 and 13 attached hereto, and it is ordered that said Petition is denied.

G. Ross Heymolds

Burton A. Boehm

William W. Carroll

Justices

or persons who saw the witnesses and heard them testify. Because of these values we have taken the position in our law that once the Industrial Commission has determined the credibility of the witnesses and decided where the preponderance of the evidence lies, we cannot upset that decision unless it has no substantial foundation in the evidence."

In the case of Turner v. Industrial Com., 393 Ill. 528, at page 535, the Court said: "The rule is firmly established that it is the province of the Industrial Commission to draw reasonable conclusions and inferences from evidentiary facts in workmen's compensation proceedings, and the courts are not privileged to set aside factual findings of the commission, unless they are manifestly against the weight of the evidence. In short, a decision of the Industrial Commission should be set aside only where it is without substantial foundation in, or is manifestly against the weight of,the evidence." And the court, after citing a number of cases in support of that point, continues by saying: "The determination of where the preponderance of the evidence lies is pre-eminently a function of the Industrial Commission."

The findings and conclusions of the administrative agency on questions of fact are to be considered prima facie true and correct. Nolting v. Civil Service Commission, 7 Ill. App. 2d 147.

In the case of Kinney v. County Board of School Trustees, 7 Ill. App. 2d, 286, in discussing the rule that the findings of an administrative agency are deemed to be prima facie correct, the Court said:"...the court is not authorized or

or landlord who saw the witnesses [illegible],
Because of these values [illegible]
that [illegible]
credibility of the witnesses [illegible] where the [illegible]
ance of the [illegible]
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In the case of [illegible] 628,
[illegible]
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[illegible]
[illegible]
In short, [illegible]
[illegible]
[illegible]
the court [illegible]
points, [illegible]
[illegible]
of the [illegible].

The findings [illegible] of the administrative agency on questions of fact are to be considered prima facie true and correct. Nolte v. Civil Service Commission, [illegible] Ill. App. 2d 247.

In the case of Kimrey v. County Board of School Trustees, 7 Ill. App. 2d, 295, in discussing the rule that the findings of an administrative agency are deemed to be prima facie correct, the Court said:"...the court is not authorized or

privileged to substitute its judgment for that of the agency unless the findings of the agency are not supported by substantial evidence. Produce Terminal Corp. v. Illinois Commerce Commission ex rel. Peoples Gas Light & Coke Co. 414 Ill. 582; Department of Public Works & Bldgs. v. Lewis, 411 Ill. 242; Mohler v. Department of Labor, 409 Ill. 79; People ex rel. Loughry v. Board of Education of Chicago, 342 Ill. App. 610. This is particularly true where the administrative body is vested with discretion in making a determination."

In the case of Lorenson v. County Board of School Trustees, 13 Ill. App. 2d 468, where the evidence was conflicting, the Court said: "A court is not privileged to substitute its judgment for that of an administrative agency if there be sufficient evidence in the record to support its findings." Citing Smith v. Board of Education, 405 Ill. 143; Community Unit District v. County Board of School Trustees of Sangamon County, 9 Ill. App. 2d 116.

If the order of discharge is supported by the evidence, it is not within the province of the trial court to disturb the findings. Martin v. Civil Service Commission, 7 Ill. App. 2 d, 128. Oswald v. Civil Service Com., 406 Ill. 506; Kulczyk v. Board of Fire & Police Com'rs., 344 Ill. App. 555; Samter v. Department of Public Welfare, 9 Ill. App. 2d 363.

In the Drezner v. Civil Service Commission case, supra the court held that the findings of the Civil Service Commission

should be reversed, on the grounds that the findings were against the manifest weight of the evidence, were not supported by any substantial evidence in the record and did not conform to the evidence in the cause. In the Brown Shoe Company v. Gordon case supra, while there were a number of witnesses available, only one testified and this the court held was not sufficient.

The cases cited here are varied. There are cases of school boards, Police and Fire Department boards, the Civil Service Commission, the Industrial Commission, and yet the rule as to their decisions or that of any administrative agency on questions of fact, is uniform. First, the decisions are to be regarded as prima facie correct and true. The determination of where the preponderance of the evidence lies is pre-eminently a function of the administrative agency.

In this case, there appeared before the board as complaining witnesses, two witnesses who not only positively identified the policeman Louis Danner, but were equally positive that he, and he only, committed the assault. Against this positive testimony, is the testimony of the policeman Louis Danner, his wife, his sister, his brother, his brother-in-law, and two rather vague neighbors. The Board of Fire and Police Commissioners of the City of Danville, determined where the weight of the evidence rested and believed the two witnesses as against the testimony of the Danner family. This they had the right to do and the Circuit Court, where the decision was

not manifestly against the weight of the evidence, did not have the right to reverse the decision of the Board.

In this case, there is ample evidence to support the decision of the administrative agency, and the judgment of the Circuit Court of Vermilion County will be reversed, and the decision of the Board of Fire and Police Commissioners of the City of Danville, Illinois, entered October 2, 1956, will be affirmed.

Reversed.

not manifestly against the weight of the evidence, will not have the right to reverse the decision of the Court.

In this case, there is ample evidence to support the decision of the trial court, and the judgment of the Circuit Court of Franklin County will be reversed, and the decision of the trial court will be affirmed. The costs of the City of Danville, Virginia, appellee herein, will be allowed.

It is so ordered.

or persons who saw the witnesses and heard them testify. Because of these values we have taken the position in our law that once the Industrial Commission has determined the credibility of the witnesses and decided where the preponderance of the evidence lies, we cannot upset that decision unless it has no substantial foundation in the evidence."

In the case of Turner v. Industrial Com., 393 Ill. 528, at page 535, the Court said: "The rule is firmly established that it is the province of the Industrial Commission to draw reasonable conclusions and inferences from evidentiary facts in workmen's compensation proceedings, and the courts are not privileged to set aside factual findings of the commission unless they are manifestly against the weight of the evidence. In short, a decision of the Industrial Commission should be set aside only where it is without substantial foundation in, or is manifestly against the weight of, the evidence." And the court, after citing a number of cases in support of that point, continues by saying: "The determination of where the preponderance of the evidence lies is pre-eminently a function of the Industrial Commission."

In the case of Allendorf v. I. J. & E. Ry. Co., 6 Ill. 2nd 164, it was said: "Judges are not free to reweigh the evidence and set aside the jury verdict merely because they, as individuals, might have arrived at different conclusions. ... Only where there is a complete absence of probative facts

to support the conclusion reached, does reversible error appear. (Starck v. Chicago and North Western Railway Co. 4 Ill. 2nd 616; Bonnier v. Chicago, Burlington and Quincy Railroad Co. 2 Ill. 2nd 606; Wetherbee v. Elgin, Joliet and Eastern Railroad Co. 191 Fed. 2nd 302.)"

The findings and conclusions of the administrative agency on questions of fact are to be considered prima facie true and correct. Molting v. Civil Service Commission, 7 Ill. App. 2nd 147.

In the case of Kinney v. County Board of School Trustees, 7 Ill. App. 2nd, 286, in discussing the rule that the findings of an administrative agency are deemed to be prima facie correct, the Court said:"...the court is not authorized or privileged to substitute its judgment for that of the agency unless the findings of the agency are not supported by substantial evidence. Produce Terminal Corp. v. Illinois Commerce Commission ex rel. Peoples Gas Light & Coke Co., 414 Ill. 582; Department of Public Works & Bldgs. v. Lewis, 411 Ill. 242; Kohler v. Department of Labor, 409 Ill. 79; People ex rel. Loughry v. Board of Education of Chicago, 341 Ill. App. 610. This is particularly true where the administrative body is vested with discretion in making a determination."

In the case of Lorenson v. County Board of School Trustees, 13 Ill. App. 2nd 466, where the evidence was conflicting, the Court said: "A court is not privileged to substitute its

judgment for that of an administrative agency if there be sufficient evidence in the record to support its findings." Citing Smith v. Board of Education, 405 Ill. 143; Community Unit District v. County Board of School Trustees of Sangamon County, 9 Ill. App. 2nd 116.

It is the duty of the court under the Administrative Review Act, to examine the record and determine whether the findings of the commission are supported by any evidence. Harrison v. Civil Service Commission, 1 Ill. 2nd 157; Loretti v. Civil Service Board, 2 Ill. App. 2nd, 89. If the order of discharge is supported by the evidence, it is not within the province of the trial court to disturb the finding. Martin v. Civil Service Commission, 7 Ill. App. 2nd 128. Caswell v. Civil Service Com., 406 Ill. 506; Kulczyk v. Board of Fire & Police Com'rs., 344 Ill. App. 555; Sauter v. Department of Public Welfare, 9 Ill. App. 2nd 363.

In the Brezner v. Civil Service Commission case, supra the court held that the findings of the Civil Service Commission should be reversed, on the grounds that the findings were against the manifest weight of the evidence, were not supported by any substantial evidence in the record and did not conform to the evidence in the cause. In the Brown Shoe Company v. Gordon case supra while there were a number of witnesses available, only one testified and this the court held was not sufficient.

judgment for that of an [illegible]

sufficient evidence in the record to [illegible]

Citing Smith v. [illegible], [illegible]

Hart District [illegible]

County, 3 Ill. App. [illegible]

[illegible] in the [illegible]

review not, [illegible]

findings of the [illegible]

Bartlett v. [illegible]

v. Civil Service [illegible]

Civil Service [illegible]

evidence in support [illegible]

provisions of [illegible]

Civil Service [illegible]

Civil Service [illegible]

police Commr., [illegible]

Public [illegible], 3 [illegible]

In the [illegible] the court held that [illegible]

should be reversed, [illegible]

against the [illegible]

by any substantial evidence [illegible]

to the evidence in the case. In the [illegible]

Gordon case more than [illegible]

available, only one [illegible]

sufficient.

The cases cited here are varied. There are cases of school boards, Police and Fire Department boards, the Civil Service Commission, the Industrial Commission, and yet the rule as to their decisions or that of any administrative agency on questions of fact, is uniform. First, the decisions are to be regarded as prima facie correct and true. Second, if supported by any substantive evidence, the decision of the administrative agency on a question of fact must be upheld, and only where there is a complete absence of probative facts to support the conclusions reached, does reversible error appear. The determination of where the preponderance of the evidence lies is pre-eminently a function of the administrative agency.

In this case, there appeared before the board as complaining witnesses, two witnesses who not only positively identified the policeman Louis Danner, but were equally positive that he, and he only, committed the assault. Against this positive testimony, is the testimony of the policeman Louis Danner, his wife, his sister, his brother, his brother-in-law, and two rather vague neighbors. The Board of Fire and Police Commissioners of the City of Danville, determined where the weight of the evidence rested and believed the two witnesses as against the testimony of the Danner family. This they had the right to do and the Circuit Court, where there was positive testimony supporting the decision of the board, did not have the right to reverse the decision of the Board.

This court has consistently held that if there is substantial evidence in the record to support the decision of the administrative agency, the decision of the administrative agency should be upheld. In this case, there is ample evidence to support the decision of the administrative agency, and the judgment of the Circuit Court of Vermilion County will be reversed, and the decision of the Board of Fire and Police Commissioners of the City of Danville, Illinois, entered October 2, 1956, will be affirmed.

Reversed.

STATE OF ILLINOIS

APPELLATE COURT THIRD DISTRICT

October Term, A. D. 1957.

General No. 10146 Agenda No. 16

Eunice Seaman, Administrator of the Estate of Dorothy Raner, Deceased, Plaintiff-Appellee, vs. State Farm Mutual Automobile Insurance Company, a Corporation, Defendant-Appellant.	Appeal from the Circuit Court of Coles County

Boeth, J.

This is an appeal from a judgment in the amount of $15,000.00 plus costs in favor of the plaintiff, Eunice Seaman, Administrator of the Estate of Dorothy Raner, deceased, and against the defendant, State Farm Mutual Automobile Insurance Company, entered by the Circuit Court of Coles County, Illinois. The case was tried without a jury.

The original and amended complaint were filed under Illinois Revised Statutes, 1955, Chapter 110, Par. 57.1, commonly known as the Illinois Declaratory Judgment Act.

The amended complaint was brought to obtain a declaration and

determination of rights, liabilities and duties, under the terms, provisions and exclusions of an automobile liability policy of insurance issued and delivered to Dorothy Baner and David Franklin Baner by State Farm Mutual Automobile Insurance Company. The defendant filed an answer to the amended complaint and an affirmative defense. The plaintiff filed a reply to the affirmative defense.

The trial court found that State Farm Mutual Automobile Insurance Company was liable to the said Eunice Seaman as Administrator of the Estate of Dorothy Baner in the sum of $15,000.00. This appeal is taken from the judgment.

The final order of the Circuit Court incorporates the facts, about which there is no dispute, together with the basis for the entry of judgment. Since this order clearly sets out the issues involved, we set the same out in full, to-wit:

> "And now this cause coming on to be heard upon the Amended Complaint for Declaratory Judgment filed by the Plaintiff herein and the Answer the Defendant, State Farm Mutual Automobile Insurance Company, a Corporation, to said Amended Complaint for Declaratory Judgment and the Affirmative Defense of the Defendant and the Reply thereof by the Plaintiff and the Court having heard the evidence, both oral and documentary and the cause being submitted to the Court for decision, The Court Finds as Follows:
>
> "(1) That the Defendant, State Farm Mutual Automobile Insurance Company, is a Corporation existing under and by virtue of the laws of the State of Illinois and is duly authorized and licensed to write and issue automobile liability insurance in said state and was so duly authorized and licensed at all times herein; that on February 20, 1954, Defendant issued and delivered for a valuable consideration to Dorothy Baner and Franklin David Baner, or either of them, its policy of insurance number 711-781-E07-13, in-

determinable of rights, liabilities and duties, under the terms, provisions and exclusions of an automobile liability policy of insurance issued and delivered in Worthy Manor and David Franklin Manor by State Farm Mutual Automobile Insurance Company. The defendant filed an answer to the amended complaint and an affirmative defense. The plaintiff filed a reply to the affirmative defense.

The trial court found that State Farm Mutual Automobile Insurance Company was liable to the said Linda Sue [illegible] of the Estate of Worthy-Manor in the amount of $[illegible]. The appeal is taken from the judgment.

The final order of the circuit court [illegible] the [illegible] about which there is no dispute, [illegible] the basis for the entry of judgment. Since the order clearly sets out the issues involved, we set the same out in full, to-wit:

> "And now this cause comes on to be heard upon the Amended Complaint for Declaratory Judgment filed by the Plaintiff herein and the Answer the Defendant, State Farm Mutual Automobile Insurance Company, a Corporation, to said Amended Complaint for Declaratory Judgment and the Affirmative Defense of the Defendant and the Reply thereto by the Plaintiff and the Court having heard the evidence, both oral and documentary, and the cause being submitted to the Court for decision, The Court finds as follows:
>
> "(1) That the Defendant, State Farm Mutual Automobile Insurance Company, is a Corporation existing under and by virtue of the laws of the State of Illinois and is duly authorized and licensed to write and issue automobile liability insurance in said state and was so duly authorized and licensed at all times herein; that on February 10, 1964, Defendant issued and delivered for a valuable consideration to Worthy Manor and Franklin David Manor, or either of them, its policy of insurance number 711-781-707-11, in-

suring a 1950 Chrysler four door sedan; that a copy of said policy in force at the time of the occurrence has been introduced in evidence marked Defendant's Exhibit 'A'.

"(2) That among other things, said policy of insurance provided:

> 'I. Coverage A--Bodily Injury Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance, or use of the automobile,';
>
> 'II. Defense, Settlement, Supplementary Payments. As respects the insurance afforded by the other terms of this policy under coverage A and B the company shall:
>
> > '(a) Defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false, or fraudulent; * * '
>
> 'III. Definition of Insured. With respect to the insurance for bodily injury liability, for property damage liability and for medical payments the unqualified word 'insured' includes any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission.';

that under 'Exclusions' said policy also provided:

> 'This policy does not apply:
>
> > '(e) Under coverage A to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law; or to the insured or any member of the family of the insured residing in the same household as the insured;'

"(3) That said policy of insurance was in full force and effect on September 4, 1954.

during a 1950 Chrysler four door sedan; that a copy of said policy in force at the time of the occurrence has been introduced in evidence marked Defendant's Exhibit 'A'.

"(2) That among other things, said policy of insurance provided:

'I. Coverage --Bodily Injury, Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance, or use of the automobile;

'II. Defense, Settlement, Supplementary Payments. To defend in the name and behalf of the insured any suit against the insured for such injury and seeking damages on account thereof, even if such suit is groundless, false or fraudulent;

'(a) Defend any suit even if it alleges such injury, sickness or disease, sustained by the insured, direct or indirect, even if such suit is groundless, false or fraudulent; . . .'

'III. Definition of Insured. With respect to the insurance for bodily injury liability, property damage liability and for medical payments, the unqualified word 'insured' includes any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission. . .';

that under 'Exclusions' said policy also provided:

'This policy does not apply:

'(a) Under coverage A to any obligation for which the insured or any company as the insurer may be held liable under any workmen's compensation law; or to the insured or any member of the family of the insured residing in the same household as the insured;'

"(3) That said policy of insurance was in full force and effect on September 4, 1954.

"(4) That on the 4th day of September, 1954, the said Dorothy Raner, described as the insured in Defendant's Exhibit 'A', while in possession of said automobile gave permission to one Donald L. Boucher to drive and operate the said 1950 Chrysler insured under said policy and that while he was so driving the said Dorothy Raner was riding as a passenger in the said automobile.

"(5) That on the 4th day of September, 1954, while the said Donald L. Boucher was driving said automobile, accompanied by Dorothy Raner, the said automobile struck a telephone pole, fences and other obstructions and the said Dorothy Raner received injuries in said collision from which she died intestate on September 5, 1954.

"(6) That Dorothy Raner at the time of her death left surviving her, Franklin David Raner, her husband and named insured in Exhibit 'A' and Ronald Wilson Vandeveer, a son by a previous marriage.

"(7) That the said Donald L. Boucher, the driver and operator of said car at the time of the accident described herein, was not related to or a member of the Family of Dorothy Raner, Franklin David Raner or Ronald Wilson Vandeveer.

"(8) That at the time of the death of the said Dorothy Raner, she was separated from the insured, Frank David Raner and living apart from him and a divorce action had been instituted between the parties. That the said Franklin David Raner was not contributing to the support of the said Dorothy Raner and was not living with her at the time of her death; that the son of Dorothy Raner, being Ronald Wilson Vandeveer, was living with Dorothy Raner and was supported by her.

"(9) That on October 5, 1954, Eunice Seaman, the mother of the said Dorothy Raner, was duly appointed Administrator of the Estate of Dorothy Raner in the County Court of Coles County, Illinois and at all times mentioned herein was the duly qualified and acting Administrator of said estate.

"(10) That on November 4, 1954, the said Eunice Seaman, as Administrator of the Estate of Dorothy Raner, Deceased, brought an action against Donald L. Boucher in the Circuit Court of Champaign County,

"(8) That on the 14th day of October, 1954, the said Dorothy Bauer, described as the insured in Defendant's Exhibit [illegible] while in possession of said automobile was operated by [illegible] Donald L. Bauer to drive and operate the [illegible] under said policy and both [illegible] the said Dorothy [illegible] the said automobile.

"(9) That on the 4th day of September, 1954, the said Donald L. Bauer was fatally injured [illegible] collie, accompanied by Dorothy Bauer, [illegible] mobile struck a telephone pole, [illegible] strung lines and the said Dorothy Bauer [illegible] injuries [illegible] on September 5, 1954.

"(10) That Dorothy Bauer at the time of her death left surviving her, Franklin David Bauer, her husband and natural insured in Exhibit [illegible] and [illegible] Dorothy Bauer, a son by a prior marriage.

"(11) That the said Donald L. Bauer, the driver and operator of said automobile [illegible] described herein, was not [illegible] the family of Dorothy Bauer, [illegible] or said [illegible] Dorothy.

"(12) That at the time of the death of the said Dorothy Bauer, she was represented from the [illegible], Frank David Bauer an living apart from [illegible] a divorce action had been instituted between the parties. [illegible] the said Franklin David Bauer was not contributing to the support of the said Dorothy Bauer and was not living with her at the time of her death; that the son of Dorothy Bauer, being [illegible] Bauer, was living with Dorothy Bauer and was cared by her.

"(13) That on October 5, 1954, Louise Bauer, the mother of the said Dorothy Bauer, was duly appointed Administrator of the Estate of Dorothy Bauer in the County Court of Cook County, Illinois and at all times mentioned herein was the duly qualified and acting Administrator of said estate.

"(10) That on November 4, 1954, the said Louise Bauer, as Administrator of the Estate of Dorothy Bauer, Deceased, brought an action against Donald L. Bauer in the Circuit Court of Champaign County,

Illinois, being Case Number 20-546, charging the said Donald L. Boucher with wilful and wanton conduct in the operation of said automobile and charging that said conduct caused the death of the said Dorothy Ramer, said action being predicated under Chapter 70, Illinois Revised Statutes, 1953.

"(11) That Donald L. Boucher, as Defendant in the lawsuit filed by the Administrator, demanded that the said State Farm Mutual Automobile Insurance Company, a Corporation, defend said suit for him under the insurance policy mentioned herein. That the said Defendant, State Farm Mutual Automobile Insurance Company, a Corporation, declined to defend the said cause of action brought by the said Administrator claiming that under Exclusion 'e' of said policy they owed no duty or obligation to defend the said Donald L. Boucher for the injury and death of the said Dorothy Ramer, the insured under the policy in question.

"(12) That subsequent thereto, the said Donald L. Boucher filed an Answer to the Complaint pending in the Circuit Court of Champaign County through his attorneys, Allen and Korkowski, denying the allegations of said Complaint.

"(13) That thereafter on May 10, 1955, Ralph E. Suddes, as attorney for said Plaintiff Administrator in the action pending in the Circuit Court of Champaign County, offered to settle said cause of action against the said Donald L. Boucher for the sum of $9500.00; that Donald L. Boucher's attorneys, Allen and Korkowski, advised State Farm Mutual Automobile Insurance Company of the offer of settlement and the State Farm Mutual Automobile Insurance Company declined to settle said cause for said sum or any other amount.

"(14) That on October 10, 1955, the cause pending in the Circuit Court of Champaign County was called for hearing before the Court and judgment was entered in favor of the Plaintiff, Eunice Seaman, Administrator of the Estate of Dorothy Ramer, deceased and against the defendant, Donald L. Boucher in the sum of $20,000.00 and costs.

"(15) That on October 11, 1955, execution was issued on said judgment against the said Donald L.

Boucher and was returned by the Sheriff of Champaign County, Illinois, 'no property found'.

"(16) That at all times mentioned herein, State Farm Mutual Automobile Insurance Company, a Corporation, refused to defend Donald L. Boucher in the case pending in the Circuit Court of Champaign County, Illinois, and refused to enter into any settlement negotiations on behalf of said Donald L. Boucher with the Plaintiff in said suit and refused and refuses to pay the judgment and costs secured by the Plaintiff or any part thereof.

"(17) That the limits of liability of the policy, Defendant's Exhibit 'A' are $15,000.00 for injury or death sustained by one person in any one accident and that the total limit of the Company's liability arising out of bodily injury, including death, at any time resulting therefrom sustained by two or more persons in any one accident shall not exceed $30,000.00.

"(18) That the said Donald L. Boucher, under said policy of insurance, was an additional insured and that the prayer for relief in the Amended Complaint for Declaratory Judgment should be granted.

"(19) That under the decision of State Farm Mutual Automobile Insurance Company vs. Ernest E. Madison, Administrator of the Estate of John A. Madison, Deceased and James Dimitrion, 11 Ill. App. 2d 206 (certiorari denied); that the exclusion clause 'e' of said policy refers to and is limited to claims under the Workmen's Compensation Act and that said provision is ambiguous; that the said Donald L. Boucher was an additional insured under said policy and that the said State Farm Mutual Automobile Insurance Company is liable to the said Eunice Seaman as Administrator in the sum of Fifteen Thousand Dollars ($15,000.00).

"It Is Therefore Ordered, Adjudged and Decreed by the Court that judgment be entered against the said State Farm Mutual Automobile Insurance Company, a Corporation, in the sum of Fifteen Thousand Dollars ($15,000.00) plus costs of this suit and in favor of Eunice Seaman, as Administrator of the Estate of Dorothy Baner, Deceased."

[illegible]

"[illegible]

"[illegible]

"(18) [illegible]

"(19) [illegible]

"It is therefore [illegible] ordered by the court that judgment be entered [illegible] said State [illegible] company, a corporation, in the [illegible] Dollars ([illegible]) plus costs [illegible] in favor of Harry [illegible], as [illegible] of Deroway [illegible].

It was conceded on oral argument before this court, that the same facts and issues were involved in State Farm Mutual Automobile Insurance Co. v. Madison, 11 Ill. App. 2d 206, 136 N.E. 2d 533 (leave to appeal denied, 9 Ill. 2d 628) as are here involved; that the suit in that case was likewise a Declaratory Judgment Action, the only difference being, that State Farm Mutual Automobile Insurance Company was plaintiff in that action instead of defendant as here; that the same authorities were cited and the same arguments were made in that action before the Appellate Court for the First District as here, in support of the contention of State Farm Mutual Automobile Insurance Company; and that the same authorities were cited and the same arguments were made in the petition for leave to appeal to the Supreme Court from the decision of the Appellate Court of the First District in State Farm Mutual Automobile Insurance Co. v. Madison, supra.

We are here asked to review the decision of the Appellate Court of the First District and the judgment of the Supreme Court in denying leave to appeal. It would be presumptuous, to say the least, for us to undertake to do so. We prefer to adhere to State Farm Mutual Automobile Insurance Co. v. Madison, supra. If the Supreme Court deems the question open to reconsideration, it can so indicate on an application for leave to appeal from this decision.

Accordingly the Circuit Court of Coles County will be affirmed.

Affirmed.

Carroll, P. J., and Reynolds, J., concur.

20

NO. 11133 (Publish Abstract Only) Agenda 16

FILED JAN 13 1958 PAUL V. WUNDER Clerk Appellate Court Second District

IN THE APPELLATE COURT OF ILLINOIS SECOND DISTRICT

October Term, A. D. 1957

15 I.A. 569

CAROL STUEBRK and CHARLES [illegible] STUEBRK, Plaintiffs-Appellants, vs. RAYMOND J. BARTLETT, doing business as Commodore Tap, et al, Defendants-Appellees.	Appeal from the Circuit Court of Lake County

MC NEAL, J.

Plaintiffs, Carol Stuebrk and Charles [illegible] Stuebrk, brought this action under the Dram Shop Act against the owners and operators of three taverns to recover damages for her personal injuries and property damage and his loss of means of support. They alleged that their damages were sustained as a result of an automobile collision caused by the negligence of Carter Bartlett, while intoxicated. At the close of plaintiffs' case the court directed the jury to return a verdict in favor of all defendants. Thereafter the court sustained plaintiffs' motion for a new trial as to Del Conte's Tavern and denied the motion as to the Commodore Tap and Rudy's Red Pepper. Plaintiffs appealed from the part of the order denying their motion for a new trial as to the defendants Rudolph and Evelyn Cranor, owners and operators of the Red Pepper.

In support of their allegations that Carter Bartlett was sold or given alcoholic liquors at Del Conte's Tavern and the Red Pepper, plaintiffs called William Del Conte and Rudolph Cranor to testify under section 60 of the Civil Practice Act. Del Conte testified that Bartlett and a companion were in his tavern for ten or fifteen minutes sometime after noon on November 5, 1955. Del Conte served Bartlett one small

bottle of beer and his companion a drink. Bartlett drank about half of his drink and left del Conte's place. Defendant Cranor testified that on the same afternoon between one and four o'clock--closer to four o'clock, Bartlett was in the Red Pepper for thirty-five or forty minutes. He sat at the bar and drank a cup of coffee and a glass of water and had a sandwich, but neither Cranor nor anyone in his employ served any alcoholic beverage to Bartlett on that day. His companion, a soldier in uniform, had a manhattan in front of him. Bartlett was not intoxicated to any extent, either at the time he came into or when he left the Red Pepper.

About 5:45 that afternoon Carol Stuehrk was driving her 1952 DeSoto north on Skokie Highway. Bartlett drove his car south on the highway, turned east at the Westleigh Road intersection and struck Mrs. Stuehrk's automobile. As a result of the collision she sustained serious injuries and her auto was a total wreck. Chief Krebner and Officer Cone of the Lake Forest Police Department testified that they were at the scene shortly after the accident and that Bartlett and his soldier companion were intoxicated.

On Cranor's motion to direct a verdict the single question for the trial court's determination was whether there was in the record any evidence which, standing alone and taken with all its intendments most favorable to plaintiffs, tended to prove the material elements of their case. Villegas v. Kercher, 11 Ill. App. 2d 282, 293; Weid v. Landau, 321 Ill. App. 19. As to the Cranors, the material allegations in the complaint were: (1) that plaintiffs sustained injuries and damages as a result of a collision of automobiles driven by Mrs. Stuehrk and Carter Bartlett; (2) that at the time of the collision Bartlett was intoxicated; and (3) that such intoxication was caused in whole or in part by alcoholic liquors sold or given to Bartlett by the Cranors, or their agents and servants. The first and second allegations were supported by evidence in the record, and the sole question for determination on this appeal is whether there was any evidence tending to prove the third allegation.

To prove that Bartlett was furnished liquor at the Red Pepper, plaintiffs relied entirely upon Cranor's testimony as shown above. Plaintiffs contend that the circumstances shown by Cranor's testimony that Bartlett sat at the bar in the Red Pepper a couple of hours before the collision for thirty-five or forty minutes with a companion who had a drink of intoxicating liquor in front of him, established a prima facie case against the Cranors sufficient to go to the jury. In support of this contention plaintiffs cite the following dram shop cases: Brown v. Butler, 66 Ill. App. 86; Kuppe v. Fako, 311 Ill. App. 450; Zahn v. Muscarello, 336 Ill. App. 188; and Corcoran v. Morrison Hotel Corporation, 339 Ill. App. 203. In those cases there was evidence that intoxicating liquor had been furnished to the intoxicated person at the dram shop involved, some time before the accident and resultant injury. The decisions in those cases were applicable to the question of the sufficiency of Del Conte's testimony to establish a prima facie case against him, but they are of no assistance in determining whether the circumstances shown by Cranor's testimony were sufficient to go to the jury.

Plaintiffs also cite Hanewacker v. Ferman, 47 Ill. App. 17, in which the Court said that the only serious question in controversy was whether appellant Hanewacker caused the intoxication of appellee Ferman's husband and thereby injured her means of support; and that "No witness testified to seeing appellant or anyone in his saloon sell or give liquor to Ferman, the conclusion that he did obtain liquor there was evidently reached from the circumstances of Ferman's spending much of his time in the saloon, his going in there sober and coming out drunk, and his being seen at appellant's bar with glasses in front of him. Appellant and his bartender denied on oath that Ferman had obtained liquor there, and they were corroborated by Ferman himself. It was a very serious matter for the jury to disbelieve this positive testimony, and find from the circumstances alone that Ferman had procured liquor there; but it was their peculiar province in view of the inharmony between the positive evidence on one side, and the circumstantial evidence on the other, to decide

[illegible]

[illegible]

[illegible]

where the truth was. We are not prepared to say that decision was wrong.

The facts in the instant case are distinguishable from those in the Ferman case. In that case it is apparent that witnesses other than Hanewacker and his bartender testified that Ferman had gone into the saloon sober and come out drunk. From these circumstances it may have been reasonable to infer that Ferman had been furnished liquor in Hanewacker's saloon. The court concluded in that case that it was for the jury to resolve the conflict between this inference derived from the testimony of other witnesses and Hanewacker's positive testimony to the contrary. In the instant case plaintiffs based their prima facie showing that Cranor furnished liquor to Bartlett solely upon Cranor's testimony. Although he testified that his bartender, Bartlett and a soldier companion were in the Red Pepper at the same time, none of them was called to testify. No one testified that Bartlett went in the Red Pepper sober and came out drunk and there was no conflict between any inference from such testimony and Cranor's positive testimony to the contrary. Further, the Supreme Court said that the Ferman case was exceedingly close on the evidence and after commenting upon other matters reversed the Appellate Court's decision in that case (152 Ill. 321).

In order to establish controverted facts, whether the evidence be direct or circumstantial, it is necessary that the evidence create a greater or less probability leading, on the whole, to a satisfactory conclusion (Myers v. Brajefska, 8 Ill. 2d 322, 329; Bolsman v. Darling State Street Corp., 6 Ill. App. 2d 517, 523). Cranor testified that Bartlett was at the bar in the Red Pepper a couple of hours before the collision, and that he sat there thirty-five or forty minutes while he had a sandwich and a cup of coffee and his companion had a manhattan in front of him. This testimony revealed a situation where there was a possibility, but not a probability, that Bartlett was furnished intoxicating liquor. Proof of a mere possibility is not sufficient (Celner v. Prather, 301 Ill. App. 224, 227). If any such probability was inferable from Cranor's testimony, we think that it was overcome by

his positive statement that neither he nor anyone in his employ furnished Bartlett any liquor that day. Although Cranor testified under section 60 of the Civil Practice Act, his testimony was not incredible and was not impeached or contradicted by any other witness. Since his testimony stands uncontradicted and unrebutted, plaintiffs were bound by Cranor's entire testimony (In re Estate of Donovan, 409 Ill. 195, 210). Since he was the only witness relied upon to prove the sale of liquor, and the only one giving any evidence relative to Bartlett's activities in the Red Pepper, the court and jury could not ignore his positive testimony which overcame the inferences relied upon by plaintiffs to establish their prima facie case (Paulson v. Cochfield, 278 Ill. App. 596, 607), and they were required to take his testimony as given (Bell v. Helmer, 75 Mich. 66, 42 N.W. 606, 609).

In our opinion there was no evidence in the record tending to prove plaintiffs' allegation that Cranors or anyone in their employ sold or gave Bartlett alcoholic liquors. The trial court committed no error in directing the jury to return a verdict in favor of the defendants, Rudolph and Evelyn Cranor, at the close of plaintiffs' case, and in denying plaintiffs' motion for a new trial. The judgment of the Circuit Court of Lake County is affirmed.

Judgment affirmed.

DOVE, P.J. and SPIVEY, J., concur.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

October Term, A. D. 1957.

General No. 10142 | Agenda No. 12.

15 I.A. 570

Dixon S. Shamel,

Petitioner-Appellant,

vs.

Dr. Louis Belinson, Superintendent, State Hospital, Jacksonville, Morgan County, Illinois,

Respondent-Appellee.

Appeal from the Circuit Court of Morgan County.

REYNOLDS, J.

This cause comes to this court on appeal from the Circuit Court of Morgan County, where the petition for writ of habeas corpus was denied by that court. Prior to the denial of the writ by the Circuit Court of Morgan County, the petitioner had petitioned the Supreme Court of the United States and the Supreme Court of Illinois for a writ of habeas corpus, and in both instances, the writ had been denied.

This court questions whether it has the authority to review the decision of the Circuit Court of Morgan County, denying the writ, but there is some authority for its review in Sections 2-4 of Chapter 91½, Illinois Revised Statutes 1955, which provides that "appeals from the final orders or judgments of the court of original jurisdiction, made and entered in proceedings under this Act, may be taken by any person, including the person alleged to be mentally ill, ... who considers himself aggrieved, to the Appellate Court of this State, in the same manner as in other civil cases in courts of record." The case of People ex rel. Chilin v. Uffelman, 9 Ill. App. 2nd 412, holds that in a criminal case no appeal is permitted, as to a denial of writ of habeas corpus, but says that our Legislature has provided in cases of persons not charged with crime, for appeals to the Appellate Court for an order refusing discharge of one committed to a State hospital, as in civil proceedings. While we may doubt our authority in this matter, we choose to err on the side of considering the petition for the writ, rather than to deny the petitioner a right to be heard. In acting in this matter, it must be remembered that this court considers the petition solely as a court of review and as a court of review its decision is limited to the record before it.

It appears from the record that the petitioner, Shamel, was committed to the Jacksonville State Hospital by the County Court of Sangamon County, Illinois, by emergency order of commitment dated November 1, 1955. The commitment was made on the petition of one A. D. Van Meter, Jr. Dr. Milton C. Baumann examined the petitioner and found him mentally ill. On January 19, 1956, the County Court of Morgan County, Illinois committed him to the Jacksonville State Hospital and from that commitment the petitions for writ of habeas corpus heretofore mentioned, have come up.

The writ of habeas corpus is a remedy for illegal restraint by Federal, State or local officials and private individuals. As generally used it refers to the writ of habeas corpus ad subjiciendum, which is a writ issued pursuant to a petition or application directed to an officer or person detaining another and requiring him to make a return thereon. It is a high prerogative writ of ancient origin in the common law, the vital puposes of which are to obtain immediate relief for illegal confinement or imprisonment without sufficient cause and to deliver a person from unlawful custody. It is essentially a writ to test the right under which a person is detained. The office of the writ is not to determine the guilt or innocence of the person, but to ascertain whether he is restrained of his liberty by due process of law. In short, the primary, if not the only object of habeas corpus is to determine the legality of restraint under which a person is held. While originating in the common law, the various states

It appears from the record that the petitioner, [illegible], was committed to the Illinois [illegible] of the County Court of Jefferson County, Illinois, [illegible] under the [illegible] 1953. The [illegible] the petition of [illegible] committed the petitioner [illegible] 1956, the County Court of [illegible] County, Illinois [illegible] him to the [illegible] that [illegible] the petitioner [illegible].

The writ of habeas corpus [illegible] Illinois [illegible], is generally [illegible] habeas corpus ad subjiciendum, which is a writ [illegible] directed to an officer or person [illegible] detaining, him to take a [illegible]. It is a [illegible] prerogative writ of ancient origin in the common law, [illegible] be [illegible] illegal [illegible] imprisonment without sufficient [illegible] from unlawful custody. It is [illegible] which a person is detained. [illegible] is not to determine the guilt or innocence of the person, but to ascertain whether he is restrained of his liberty by due process of law. In short, the primary, if not the only object of habeas corpus is to determine the legality of restraint under which a person is held. While originating in the common law, the various states

have by legislative enactment provided for the writ of habeas corpus, and our State of Illinois has provided for the writ of habeas corpus by its Chapter 65 of the Illinois Revised Statutes. In the said Habeas Corpus Act, Section 21 of the Act provides in part: "No person shall be discharged under the provisions of this Act, if he is in custody either--

1. By virtue of process by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or,

2. By virtue of a final judgment or decree of any competent court of civil or criminal jurisdiction * * *".

The petitioner complains that he has been kidnapped from his residence in Springfield, Illinois, and that his rights under the Constitution of the United States, and the Constitution of the State of Illinois have been violated. However, the record as submitted with the petition does not in any way substantiate the claim of the petitioner.

The office of a writ of habeas corpus is to obtain release of a person illegally restrained of his liberty and the writ is authorized only where a judgment is absolutely void or detention is illegal by some act, omission or event which has taken place. People ex rel. Cassidy v. Fisher, 372 Ill. 146.

Habeas corpus is a writ of right but is not a writ of cause. The privilege of a person to demand the writ as a matter of right does not necessarily imply that he must also have the writ as a

have by legislative enactment provided for the writ of habeas corpus, and our State of Illinois has provided for the writ of habeas corpus by its Chapter 65 of the Illinois Revised Statutes. In the said Habeas Corpus Act, Section 21 of the Act provides in part: "No person shall be discharged under the provisions of this Act, if he is in custody either--

1. By virtue of process by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or,

2. By virtue of a final judgment or decree of any competent court of civil or criminal jurisdiction * * *".

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Habeas corpus is a writ of right but is not a writ of course. The privilege of a person to demand the writ as a matter of right does not necessarily imply that he must also have the writ as a

matter of right without showing a prima facie case entitling him to be discharged or bailed.

Here, the petitioner has alleged a number of reasons why he believes he should be discharged, claiming violations of his rights, incarceration without process of law, fraud on the part of his conservator, and other matters, but there is nothing in the record to substantiate these charges. The record shows that he was committed by order of the County Court of Sangamon County, Illinois. The County Court of Sangamon County had jurisdiction to commit him in a proper case. This is provided in Section 2-2 of Chapter 91½ Illinois Revised Statutes, 1955, where it is provided: "Jurisdiction over the persons of mentally ill persons and persons in need of mental treatment, not charged with crime, is hereby vested in the County Courts of the several counties of the State."

The record discloses that the court action was instituted by A. D. Van Meter, Jr., his conservator, and the petition is a part of the record, as provided by Section 5-1 of Chapter 91½ of the Statutes. The record shows that an order of committal of the petitioner was duly signed by the County Judge of Sangamon County, Illinois, as provided by Section 5-11. The record shows that he is held by the authorities of the Jacksonville State Hospital by reason of the order of committal.

Section 3-1 of the Mental Health Act, provides as follows:

matter of right without awarding a prima facie case entitling him to be discharged or bailed.

Here, the petitioner [illegible] believes he should be released, [illegible] right, [illegible] of his conscience, and [illegible] the rights to substantial [illegible] his conviction [illegible] County, Illinois. The County Judge [illegible] to remand him in a proper case. [illegible] of chapter 70 Illinois [illegible] 1957, which is as follows: "Habeas corpus [illegible] and persons [illegible] in hereby [illegible] of the State."

The record [illegible] by A. [illegible], [illegible] a part of the record, as provided by section 5-1 of chapter 110 of the Statutes. The record shows that [illegible] of the petitioner was [illegible] County, Illinois, as provided by section 5-11. The record shows that he is held by the authorities of the Lexingtonville State Hospital by reason of the order of commitment.

Section 5-1 of the Civil Practice Act, provides as follows:

"A person alleged to be mentally ill, mentally deficient, or in need of mental treatment, to a degree which warrants hospital care, who has not previously been adjudged mentally ill, mentally deficient, or in need of mental treatment by a judgment of a court of competent jurisdiction, which judgment remains in full force and effect, may be admitted to and confined in a hospital by compliance with any of the following admission procedures:

1. By voluntary application.
2. By court commitment."

Since the primary purpose of a hearing on petition for writ of habeas corpus is to determine the jurisdiction of the court who issued the order of committal to a hospital in the first instance, and the legality of the order of committal and in this case, the record here shows that the court had jurisdiction and that the petitioner is held in the Jacksonville State Hospital as a mentally ill person under the provisions of the Mental Health Act of Illinois, and that all the requirements for committal have been met, and there appearing nothing in the record to show otherwise, the judgment of the Circuit Court of Morgan County, denying the writ of habeas corpus will be affirmed.

Affirmed.

"A person alleged to be mentally ill, mentally deficient, or in need of mental treatment, [illegible] hospital care, who [illegible] ill, mentally deficient, [illegible] judgment of a court of competent [illegible] remain in full [illegible] filed in a hospital [illegible] mission proceedings:

1. [illegible]
2. [illegible]

[illegible] work of [illegible] court who issues [illegible] first instance, and [illegible] in this case, [illegible] diction are [illegible] Hospital as a mentally ill person [illegible] Mental Health [illegible] commitment have [illegible] to allow otherwise, the judgment of the [illegible] County, denying the writ of habeas corpus will be affirmed.

AFFIRMED.

Filed January 14, 1958

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

October Term, A. D. 1957.

General No. 10142

Agenda No. 12.

15 I.A. 570

Dixon S. Shamel,

Petitioner-Appellant,

vs.

Dr. Louis Belinson, Superintendent, State Hospital, Jacksonville, Morgan County, Illinois,

Respondent-Appellee.

Appeal from the Circuit Court of Morgan County.

REYNOLDS, J.

This cause comes to this court on appeal from the Circuit Court of Morgan County, where the petition for writ of habeas corpus was denied by that court. Prior to the denial of the writ by the Circuit Court of Morgan County, the petitioner had petitioned the Supreme Court of the United States and the Supreme Court of Illinois for a writ of habeas corpus, and in both instances, the writ had been denied. The petitions to the Supreme Court of the United States and to the Supreme Court of the State of Illinois are in the record. What purports to be a petition to the Appellate Court is also in the record, but we are unable to find petition for writ to the Circuit Court of Morgan County in the record.

This court questions whether it has the authority to review the decision of the Circuit Court of Morgan County, denying the writ, but there is some authority for its review in Sections 2-4 of Chapter 91½, Illinois Revised Statutes 1955, which provides that "appeals from the final orders or judgments of the court of original jurisdiction, made and entered in proceedings under this Act, may be taken by any person, including the person alleged to be mentally ill, ... who considers himself aggrieved, to the Appellate Court of this State, in the same manner as in other civil cases in courts of record." The case of People ex rel. Pauling v. Uffelman, 9 Ill. App. 2nd 412, holds that in a criminal case no appeal is permitted, as to a denial of writ of habeas corpus, but says that our Legislature has provided in cases of persons not charged with crime, for appeals to the Appellate Court for an order refusing discharge of one committed to a State hospital, as in civil proceedings. While we may doubt our authority in this matter, we choose to err on the side of considering the petition for the writ, rather than to deny the petitioner a right to be heard. In acting in this matter, it must be remembered that this court considers the petition solely as a court of review and as a court of review its decision is limited to the record before it.

It appears from the record that the petitioner, Shamel, was committed to the Jacksonville State Hospital by the County Court of Sangamon County, Illinois, by emergency order of commitment dated November 1, 1955. The commitment was made on the petition of one A. D. Van Meter, Jr. Dr. Milton C. Baumann examined the petitioner and found him mentally ill. On January 19, 1956, the County Court of Morgan County, Illinois committed him to the Jacksonville State Hospital and from that commitment the petitions for writ of habeas corpus heretofore mentioned, have come up.

The writ of habeas corpus is a remedy for illegal restraint by Federal, State or local officials and private individuals. As generally used it refers to the writ of habeas corpus ad subjiciendum, which is a writ issued pursuant to a petition or application directed to an officer or person detaining another and requiring him to make a return thereon. It is a high prerogative writ of ancient origin in the common law, the vital purposes of which are to obtain immediate relief for illegal confinement or imprisonment without sufficient cause and to deliver a person from unlawful custody. It is essentially a writ to test the right under which a person is detained. The office of the writ is not to determine the guilt or innocence of the person, but to ascertain whether he is restrained of his liberty by due process of law. In short, the primary, if not the only object of habeas corpus is to determine the legality of restraint under which a person is held. While originating in the common law, the various states

have by legislative enactment provided for the writ of habeas corpus, and our State of Illinois has provided for the writ of habeas corpus by its Chapter 65 of the Illinois Revised Statutes. In the said Habeas Corpus Act, Section 21 of the Act provides in part: "No person shall be discharged under the provisions of this Act, if he is in custody either--

1. By virtue of process by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or,

2. By virtue of a final judgment or decree of any competent court of civil or criminal jurisdiction * * *".

The petitioner complains that he has been kidnapped from his residence in Springfield, Illinois, and that his rights under the Constitution of the United States, and the Constitution of the State of Illinois have been violated. However, the record as submitted with the petition does not in any way substantiate the claim of the petitioner.

The office of a writ of habeas corpus is to obtain release of a person illegally restrained of his liberty and the writ is authorized only where a judgment is absolutely void or detention is illegal by some act, omission or event which has taken place. People ex rel. Cassidy v. Fisher, 372 Ill. 146.

Habeas corpus is a writ of right but is not a writ of cause. The privilege of a person to demand the writ as a matter of right does not necessarily imply that he must also have the writ as a

matter of right without showing a prima facie case entitling him to be discharged or bailed.

Here, the petitioner has alleged a number of reasons why he believes he should be discharged, claiming violations of his rights, incarceration without process of law, fraud on the part of his conservator, and other matters, but there is nothing in the record to substantiate these charges. Petitioner does not allege in his petitions that are in the record that he has recovered from his mental illness, is now sane and no longer in need of mental treatment. The record shows that he was committed by order of the County Court of Sangamon County, Illinois. The County Court of Sangamon County had jurisdiction to commit him in a proper case. This is provided in Section 2-2 of Chapter 91½ Illinois Revised Statutes, 1955, where it is provided: "Jurisdiction over the persons of mentally ill persons and persons in need of mental treatment, not charged with crime, is hereby vested in the County Courts of the several counties of the State."

The record discloses that the court action was instituted by A. D. Van Meter, Jr., his conservator, and the petition is a part of the record, as provided by Section 5-1 of Chapter 91½ of the Statutes. The record shows that an order of committal of the petitioner was duly signed by the County Judge of Sangamon County, Illinois, as provided by Section 5-11. The record shows that he is held by the authorities of the Jacksonville State Hospital by reason of the order of committal.

Section 3-1 of the Mental Health Act, provides as follows:

"A person alleged to be mentally ill, mentally deficient, or in need of mental treatment, to a degree which warrants hospital care, who has not previously been adjudged mentally ill, mentally deficient, or in need of mental treatment by a judgment of a court of competent jurisdiction, which judgment remains in full force and effect, may be admitted to and confined in a hospital by compliance with any of the following admission procedures:

1. By voluntary application.

2. By court commitment."

Since the record here shows that the court had jurisdiction and that the petitioner is held in the Jacksonville State Hospital as a mentally ill person under the provisions of the Mental Health Act of Illinois, and that all the requirements for committal have been met, and there appearing nothing in the record to show otherwise, the judgment of the Circuit Court of Morgan County, denying the writ of habeas corpus will be affirmed.

Affirmed.

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